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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

DOROTHY ELLENDER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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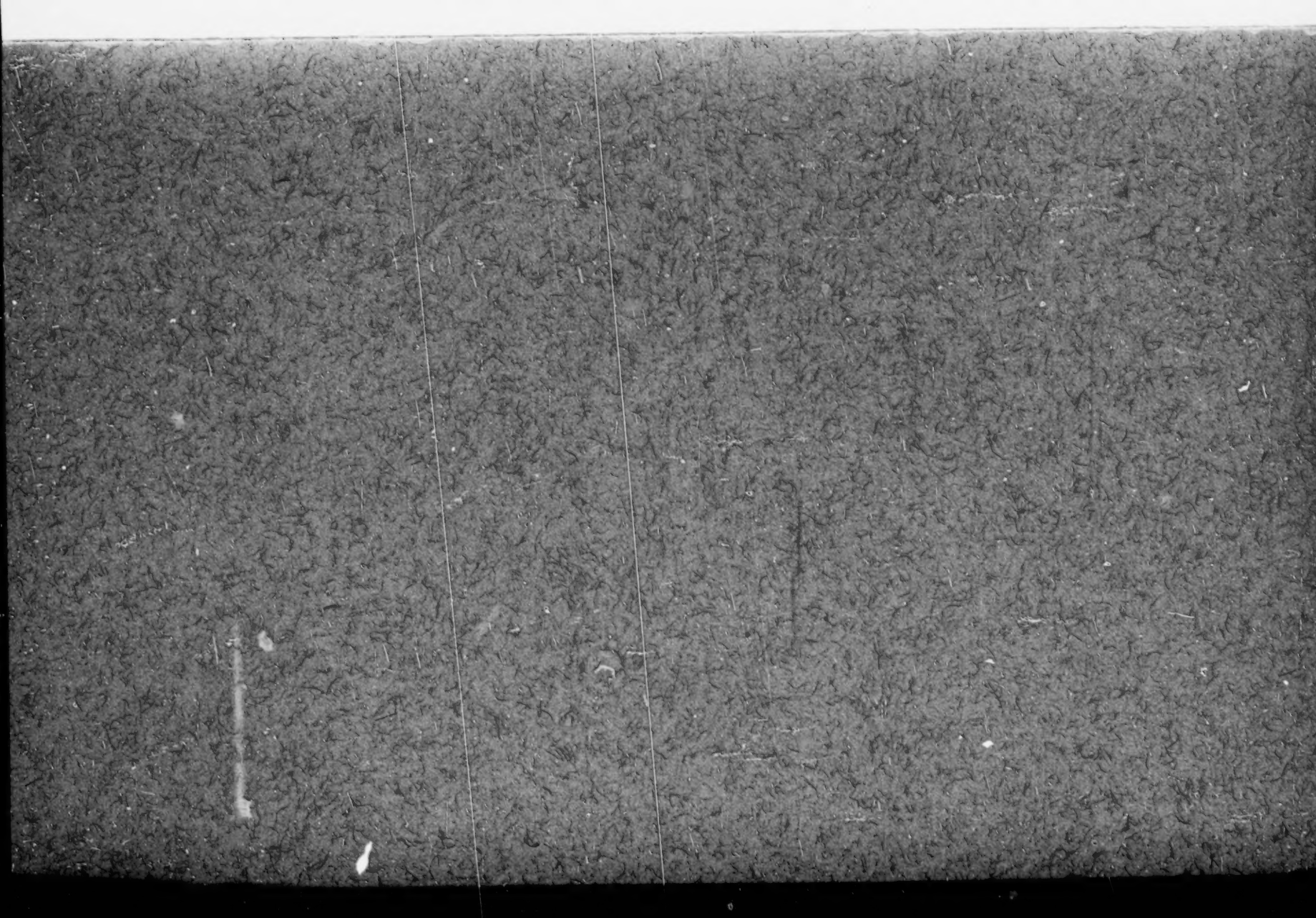

QUESTION PRESENTED

Whether a final judgment is entered within the meaning of Fed. R. Civ. P. 58 and 79(a)—thus commencing the running of the time for appeal—when the judgment issued by the district court, and the accompanying entry on the district court's docket sheet, do not mention the relief awarded by the court and do not indicate that the case has been terminated.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, named respondents are Angela Zamski, James Trowbridge, Louis W. Brunjes, and Verley Smith. These respondents represent a class composed of all persons in New York who receive Social Security benefits under the Old Age, Survivors and Disability program, and who have been informed that they must refund overpayments made under the Supplemental Security Income program. Richard S. Schweiker, Margaret M. Heckler, John Svahn, and Martha McSteen were named as defendants below.

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No.

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v.

DOROTHY ELLENDER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the court of appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported; the initial opinion of the court of appeals in this case is reported at 781 F.2d 314. The initial opinion of the district court is reported at 575 F. Supp. 590; the subsequent opinions of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Fed. R. Civ. P. 58 provides:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Fed. R. Civ. P. 79(a) provides:

> Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts,

and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

STATEMENT

Although the background of this case is convoluted, the relevant procedural developments are easily summarized. In 1983, the district court awarded respondents partial summary judgment and injunctive relief; the court did not enter a final judgment at that time, however, because claims for money damages and attorneys' fees remained outstanding. In December 1984, respondents' claims for money damages were dismissed. Two weeks later, in January 1985, the district court entered a judgment awarding attorneys' fees to respondents. This judgment, and the corresponding entry on the district court's docket sheet, referred only to the fee award; it did not indicate that final judgment had been entered in the case, and made no mention of the relief awarded on the merits. In subsequent proceedings, the court of appeals nevertheless held that this attorneys' fee judgment was sufficient, under Fed. R. Civ. P. 58 and 79(a), to terminate the entire case and commence the running of the government's time to appeal on the *merits*. This holding, which forecloses the

government from appealing the district court's ruling on the merits, is the subject of this petition.

1. This case began as a challenge in the United States District Court for the Southern District of New York to the Department of Health and Human Service's (HHS) use of so-called "voluntary cross-program recovery" to obtain recoupment of overpayments made under the Supplemental Security Income program (SSI). In brief, cross-program recovery permits HHS, with the recipient's consent, to recoup SSI overpayments by withholding a portion of the Social Security benefits paid to the recipient under the Old Age, Survivors and Disability program. See generally App., *infra*, 27a-32a. To put cross-program recovery into effect, HHS sent notices to recipients stating, among other things, that "[t]here is an outstanding * * * balance on your supplemental security income overpayment," and providing that "[f]or your convenience, we can withhold the balance of your overpayment from your social security benefit" (*id.* at 31a). Respondents argued that cross-program recovery, even if voluntary, is barred by 42 U.S.C. 407(a).[1] Respondents also maintained that the notices sent by HHS were constitutionally deficient, and sought money damages from individual HHS officials.

The district court preliminarily enjoined the use of cross-program recovery in 1982. On November 17, 1983, the court granted partial summary judgment in favor of respondents, holding the cross-program recovery mechanism illegal and finding that the HHS

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[1] That provision provides that "[t]he right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process."

notices were defective as a matter of due process. App., *infra*, 27a-63a. The court failed to dispose of the individual damages claims against HHS officials at that time, however, and it did not issue a judgment on a separate document that was distinct from its opinion and order.

2. After the district court rendered its partial decision on the merits, respondents moved for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. On April 12, 1984, the court issued an opinion holding the government liable for fees. See App., *infra*, 6a. The court again withheld judgment, however, directing the parties to negotiate an appropriate sum for the award. On July 20, 1984, the parties stipulated that the fees awarded by the April 12 opinion should amount to $40,734.30. *Id.* at 25a-26a. But the government notified respondents that the fees could not be certified for payment at that time because a final judgment on the fee award had not yet been entered (see *id.* at 6a, 16a).

On December 19, 1984, the parties stipulated to the dismissal of respondents' outstanding individual damage claims (App., *infra*, 22a). Shortly afterwards, without notifying counsel for HHS (See App., *infra*, 16a-17a), respondents' attorney submitted a proposed attorneys' fee judgment to the clerk of the district court, which read:

> Upon the annexed opinion and order of the Court entered April 12, 1984 and the annexed stipulation and order entered July 20, 1984 it is
>
> Adjudged that the plaintiffs' counsel do have and recover of the defendants the sum of $40,734.30.

App., *infra*, 22a. The clerk evidently entered this judgment on the district court's docket sheet on Jan-

uary 3, 1985; the entry for that date reads, in full: "Filed JUDGMENT #85,0008 . . . . It is Adjudged that the pltffs' counsel do have & recover of the defts. the sum of $40,734.30. Cooper, J. m/c." *Id.* at 70a. The district judge signed this judgment on January 4, 1985.[2]

Respondents' attorney did not notify counsel for the government of the entry of this judgment until March 8, 1985[3]—64 days after entry of the judgment, and thus four days after the government's time for noticing an appeal had expired (see Fed. R. App. P. 4(a)(1)). On that date, respondents' lawyer informed the government that judgment had been entered and demanded payment of the attorneys' fees.

3. Armed with this knowledge, the government promptly moved for relief from the attorneys' fee judgment pursuant to Fed. R. Civ. P. 60(b). The district court, however, denied this motion on July 19, 1985. App., *infra*, 15a-21a. The court held that the attorneys' fee issue was collateral to the merits, and "[c]onsequently, judgment was appropriately entered on that issue, and it became appealable on the date [it] was entered" (*id.* at 18a-19a).[4] The court also held that attorneys' fees may be awarded

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[2] At the same time, the judge sent the clerk an internal memorandum that read: "This judgment closes this case. If for any reason this action cannot be closed, please advise Chambers immediately by calling Law Clerk at Ext. 0972. Thank you." App., *infra*, 7a.

[3] While the clerk's notation "m/c" indicated that copies of the judgment were mailed to counsel for the parties (App., *infra*, 7a), a copy was not in fact received by the government.

[4] In the course of this ruling, the district court observed that "a formal judgment was never entered after our November 17, 1983 opinion permanently enjoining defendants' challenged practices" (App., *infra*, 19a n.1).

under EAJA prior to the entry of final judgment on the merits (*id.* at 19a-21a). And the court concluded that respondents' counsel had not been obligated to notify the government prior to submission of the proposed judgment because "the judgment filed was one which the local rules contemplate would be prepared as a ministerial act by the Court clerk pursuant to Fed. R. Civ. P. 58" (*id.* at 19a).

HHS filed a timely notice of appeal from the denial of its Rule 60(b) motion. The government's notice of appeal also raised a challenge to the district court's 1983 ruling on the legality of cross-program recovery; while the government took the position that no final judgment had yet been entered on that issue, it suggested that the notice of appeal was being filed in anticipation of "any final judgment to be entered thereon in this action." At the same time, the government moved the district court to enter a final judgment on the merits to permit an appeal on that point to proceed.

On October 7, 1985, the district court denied HHS's motion for entry of final judgment on the merits (App., *infra*, 14a). The district court opined that "[o]ur order (supported by our opinion) filed November 17, 1983 permanently enjoining defendants' challenged practices was by law immediately appealable pursuant to 28 U.S.C. § 1292(a)(1) 22 months ago. During that period no appeal was taken and no action by defendants to enter final judgment [sic]." The court found "no justification or excuse for [the government's] failure to proceed as hereinabove indicated." *Ibid.* The government promptly appealed this decision. HHS thus had two appeals pending: one (No. 85-6274) from both the denial of the Rule 60(b) motion relating to attorneys' fees

and (concededly prematurely) from the district court's ruling on the legality of cross-program recovery, the other (No. 85-6332) from the district court's denial of the government's motion for entry of final judgment on the merits.

4. In response to the government's first notice of appeal (in No. 85-6274), respondents filed a motion in the court of appeals asking the Second Circuit to dismiss the appeal as untimely insofar as it purported to challenge the district court's 1983 ruling on the merits. Respondents took the position that the appeal was not premature, but rather was too late: they argued that the district court already *had* issued a final order disposing of the entire case, including the merits—either on December 19, 1984, when it dismissed the individual damages claims, or on January 4, 1985, when it issued its attorneys' fee judgment. Memorandum of Law in Support of Plaintiffs-Appellees' Motion to Dismiss 5.

On January 15, 1986, the court of appeals granted this motion, dismissing as untimely the portion of the notice of appeal in No. 85-6274 that challenged the district court's 1983 ruling on the legality of cross-program recovery.[5] In doing so, the court rejected the government's contention that the district judge never had entered a final judgment on the merits, as required by Fed. R. Civ. P. 58. The court of appeals recognized that Rule 58 directs "that every judgment be set forth on a separate document," and that Fed. R. Civ. P. 79(a) requires the clerk of the district court to "enter a judgment in the civil docket for the case, briefly showing its substance and date of entry." App., *infra*, 9a. But the court held

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[5] The court acknowledged that the Rule 60(b) appeal could proceed (App., *infra*, 13a). The government has since withdrawn that appeal, however.

these requirements to have been satisfied by the January 4, 1985, attorneys' fee judgment: "It was set out in a separate document, and its contents were summarized in the clerk's docket for the case" (*id.* at 10a).[6] Similarly, the court of appeals held that the January 4 judgment had not been limited to the collateral matter of attorneys' fees, finding "no reason * * * why an award of fees may not be made prior to or simultaneously with the entry of final judgment" (*id.* at 11a).

The court of appeals acknowledged that it "normally [would] expect that the final judgment in an action would at least mention the permanent relief granted by the court, and this would be the better practice when no other document has been entered as a separate order setting forth the terms of such relief." But it found "no requirement in the Federal Rules of Civil Procedure that the document that constitutes the final judgment in a case be comprehensive." App., *infra*, 12a-13a. Instead, the court of appeals held it to be "dispositive" here "that the record reveals that the district court 'intended the [J]udgment to represent the final decision in the case' " (*ibid.*) (quoting *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 385 n.6 (1978)). The court therefore held that the January 4, 1985, order was the final judgment in the action within the meaning of Rule 58, and that it commenced the running of the government's time to appeal on the merits.[7] Because the

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[6] The court concluded that the December ruling was not a final judgment because "the court's order was merely endorsed on a stipulation and was not set forth in a separate document" (App., *infra*, 9a-10a).

[7] The court also held that the judgment was final within the meaning of 28 U.S.C. 1291, so that appellate jurisdiction existed in the case. On this issue, as it had in analyzing

notice of appeal in No. 85-6274 was filed on September 17, 1985, more than eight months after the entry of the January 4 judgment, the court held that the appeal was well out-of-time. App., *infra*, 13a.

This holding left temporarily unresolved the status of the government's appeal from the denial of its motion for entry of a final judgment on the merits (No. 85-6332). Citing its decision in No. 85-6274, however, the court of appeals subsequently dismissed the appeal in No. 85-6332. App., *infra*, 2a-3a.

REASONS FOR GRANTING THE PETITION

Although the procedural background here is complex, this case starkly presents a straightforward and recurring issue that has troubled the courts for years: " 'the old, old question of when is a judgment a judgment.' " *Diamond* v. *McKenzie*, 770 F.2d 225, 232 (D.C. Cir. 1985) (Robinson, C.J., concurring) (footnote omitted) (quoting *Cedar Creek Oil & Gas Co.* v. *Fidelity Gas Co.*, 238 F.2d 298 (9th Cir. 1956)). Here, the court of appeals looked to the district judge's intent in holding that a final judgment had been entered on the *merits* when the judge issued, and the clerk recorded on the docket, a judgment that

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whether judgment had been entered for purposes of Rule 58, the court reasoned that "the determining factor is 'whether the district court intended the judgment to represent the final decision in the case' " (App., *infra*, 10a (quoting *Bankers Trust Co.*, 435 U.S. at 385 n.6)). On the facts here, the court had "little difficulty" concluding that the district judge intended the January 4, 1985, judgment "to be the final decision in the case," noting that he had instructed the clerk that the judgment " 'close[d] this case' " (App., *infra*, 10a). In the court of appeals' view, this conclusion was confirmed by the fact that no issues remained to be adjudicated after December 1984 (*ibid.*).

in terms settled only the collateral matter of attorneys' fees. Despite its technical nature, this holding may have dramatic effects. As this case illustrates—in the context of the district court's invalidation of a significant federal program—the court of appeals' approach permits the expiration of the time for appeal before the losing party effectively has been apprised that the appeal time is running. A holding of this sort "is of importance and concern to every litigant in a federal court." *United States* v. *Indrelunas*, 411 U.S. 216, 218 (1973).[8]

The court of appeals' analysis, however, is deeply flawed. It is inconsistent with the language and purposes of the Federal Rules of Civil Procedure governing the entry of judgments. And it cannot be reconciled with the general approach taken by this Court, and by the other courts of appeals, in interpreting those Rules. In these circumstances, review of the decision below by this Court is appropriate.[9]

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[8] This petition seeks review only of the court of appeals' judgment in No. 85-6332. In our view, the notice of appeal in No. 85-6274 was premature insofar as it sought to challenge the district court's ruling on the merits, because to this day that court has refused to enter a final judgment; while the court of appeals therefore relied on an improper rationale in dismissing that appeal, we do not take issue with the disposition in that case. Instead, our submission is that the district court erred in refusing to enter a final judgment on the merits, and that the court of appeals erred in No. 85-6332 in failing to direct it to do so. Because the court of appeals' decision in No. 85-6332 relies upon the reasoning expressed in the court's opinion in No. 85-6274, however, we address the reasoning of the latter opinion in this petition.

[9] The Court has several times granted certiorari to resolve—occasionally without full briefing and argument—issues relating to the running of the time for appeal. See *Acosta* v.

1. If the losing party in a civil suit wishes to take an appeal from the decision of a district court, it must file a notice of appeal within 30 days of the entry of the district court's judgment; when the losing party is the federal government, a notice of appeal must be filed within 60 days of that date. 28 U.S.C. 2107; Fed. R. App. P. 4(a)(1). Prior to 1963, however, there was considerable uncertainty about which actions of the district courts marked the formal entry of judgment, and thus commenced the running of the time for appeal. This Court had indicated that determining whether a given order encompassed the final judgment in a case turned largely on the district judge's intent in issuing that order. *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-233 (1958). See Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 Harv. L. Rev. 801, 831 (1964). Even so, however, "[u]ncertainty continued to reign * * * for the judge's intention was itself a highly subjective criterion." *Diamond*, 770 F.2d at 233 (Robinson, C.J., concurring) (footnote omitted). See Fed. R. Civ. P. 58 advisory committee notes (1963 Amendment); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2781, at 8 (1973).

To "eliminate[] these uncertainties," the Federal Rules of Civil Procedure were amended in 1963. Fed. R. Civ. P. 58 advisory committee notes (1963 Amendment). As modified, Rule 58, which governs the entry of judgment, provides that "[e]very judg-

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Louisiana Department of Health and Human Resources, No. 85-1500 (June 30, 1986) (per curiam); *United States* v. *Indrelunas*, *supra* (per curiam); *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). Cf. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978).

ment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 79(a), in turn, requires the district court clerk to record all judgments on the civil docket, and provides that "[t]hese entries shall be brief but shall show the * * * substance of each order or judgment of the court." By establishing mechanical rules to govern the entry of judgment, these two provisions in combination were intended to "remove uncertainties as to when a judgment is entered." *Indrelunas*, 411 U.S. at 219. See *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 384 (1978). Application of these rules accordingly must be strict and objective: judgment must be entered both on a separate document and on the docket sheet before the time to appeal begins to run, even if years elapse between the district court's actual decision in the case and the court's formal entry of final judgment. See, *e.g.*, *Indrelunas*, 411 U.S. at 211.[10]

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[10] The parties may waive Rule 58's requirement that judgment be entered on a separate document. See *Bankers Trust Co.*, 435 U.S. at 384-386. When a district court issues what appears to be the final decision in a case, the losing party may file an appeal from that order even if the "judgment" does not satisfy Rule 58's requirements. The Court has explained that strict application of the separate document requirement in these circumstances would serve no useful purpose; it would simply result in remand of the case for entry of final judgment, from which another appeal then would be taken. See *Bankers Trust Co.*, 458 U.S. at 385. The Court has made clear, however, that this exception may not be applied in a manner that would deprive a party of its right to appeal. See *ibid.* ("The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered"); *id.* at 386; *Louisiana World Exposition* v. *Logue*, 746 F.2d 1033, 1038-1039 (5th Cir. 1984); *Townsend* v. *Lucas*, 745 F.2d 933, 934 (5th Cir. 1984);

2. In holding that a final judgment had been entered on the merits, the court of appeals ruled that the requirements of Rules 58 and 79(a) were satisfied by the district court's actions here. The court of appeals reasoned that the January 4, 1985, attorneys' fee order complied with Rule 58 because it is a judgment that appears on a separate document. The corresponding docket entry, the court added, accorded with the dictates of Rule 79(a) because it accurately summarized the January 4 attorneys' fee award. Having reached these conclusions, the court essentially found the *contents* of the order and docket entry to be irrelevant. The court of appeals thus held that the reach of the judgment was not affected by the fact that, in terms, it mentioned only the attorneys' fee portion of the case and did not describe the relief awarded on the merits; the court found "no requirement in the Federal Rules of Civil Procedure that the document that constitutes the final judgment in a case be comprehensive" (App., *infra*, 13a). Instead, the court of appeals held it "dispositive" that the district judge intended the attorneys' fee judgment to terminate the litigation as a whole (*ibid.*).

This approach, however, cannot be squared with the decisions of this Court and of the other courts of appeals, which have recognized that reliance on the district judge's intent in determining whether a final judgment has been entered "directly contravenes the requirement that Rule 58 be mechanically applied." *Diamond*, 770 F.2d at 229. See *id.* at 230; *id.* at 233

In re Smith Corset Shops, Inc., 696 F.2d 971, 975 (1st Cir. 1982). Indeed, even when the *Bankers Trust Co.* exception is applicable, courts have suggested that the better practice is for litigants to seek the entry of a final judgment prior to appeal. See, *e.g.*, *Hanson* v. *Town of Flower Mound*, 679 F.2d 497, 501-502 (5th Cir. 1982).

(Robinson, C.J., concurring) ("the judge's intention as the criterion has * * * been completely displaced"). As noted above, the drafters of the Rule intended to overcome the uncertainty—and the "occasional grief to litigants as a result of this uncertainty" (*Indrelunas*, 411 U.S. at 220)—that necessarily inhered in a test turning on subjective intent.[11] They accordingly developed the separate document rule, the application of which, as this Court repeatedly has explained, must be "mechanical" (*Indrelunas*, 411 U.S. at 222) and "[t]echnical" (*Bankers Trust Co.*, 435 U.S. at 386). See *id.* at 384. More generally, they emphasized the importance of rules that would let the parties know where they stood at all times, and that " 'should be interpreted to prevent the loss of the right of appeal, not to facilitate loss.' " *Bankers Trust Co.*, 435 U.S. at 386 (quoting 9 J. Moore, *Federal Practice* ¶ 110.08[2], at 120 n.7 (1970)).[12]

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[11] In finding the intent of the district judge dispositive here, the court of appeals seemingly relied on language from *Bankers Trust Co.* (App., *infra*, 13a (quoting 435 U.S. at 386 n.6)). In doing so, however, the court of appeals plainly misread this Court's meaning. *Bankers Trust Co.* indicated that, in determining "whether the decision of the District Court was 'final' *for purposes of* [*28 U.S.C.*] § *1291*," "the courts of appeals must * * * determine whether the district court intended the judgment to represent the final decision in the case." 435 U.S. at 385-386 n.6 (emphasis added). As the Court made clear, however, the question whether an order satisfies the final judgment requirement of Section 1291, and the question whether it complies with Rule 58's separate document rule, are entirely distinct. See *Bankers Trust Co.*, 435 U.S. at 383-384; *Parisie* v. *Greer*, 705 F.2d 882, 890 (opinion of Eschbach, J.) (7th Cir.) (en banc), cert. denied, 464 U.S. 918, 950 (1983). The Court nowhere suggested that the district court's intent has any bearing on the latter question.

[12] The courts of appeals—with the exception of the Second Circuit—have taken this guidance to heart, concluding that

Given the premium placed upon clarity in application of the Rules, the court of appeals necessarily erred in holding that the separate document required by Rule 58—and the corresponding docket entry mandated by Rule 79(a)—need not be "comprehensive" (App., *infra*, 13a). While "'[n]o form of words . . . is necessary to evince [the] rendition [of a judgment]'" (*F. & M. Schaefer Brewing Co.*, 356 U.S. at 232, quoting *United States* v. *Hark*, 320 U.S. 531, 534 (1944)), an order or docket entry obviously will put the losing party on notice that his time to appeal is running only if it "exhibit[s] the judge's statement of the substance of the court's decision." *C.I.T. Financial Service* v. *Yeomans*, 710 F.2d 416, 417 (7th Cir. 1983). And the requirement that the judgment intelligibly summarize the district court's holding is confirmed by Rule 79(a), which flatly mandates that the docket "show the substance of each * * * judgment of the court." When the judgment involved is

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"[t]he purpose of the separate document requirement is to avoid the inequity of a party being denied the opportunity to appeal because of failure to realize which of several actions by the court constituted 'entry' of judgment." *Taylor Rental Corp.* v. *Oakley*, 764 F.2d 720, 721 (9th Cir. 1985). They accordingly have endorsed a mechanical application of Rule 58. See, *e.g.*, *Diamond*, 770 F.2d at 230; *United States* v. *City of Kansas City*, 761 F.2d 605 (10th Cir. 1985); *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 290 (7th Cir. 1985); *Louisiana World Exposition* v. *Logue*, 746 F.2d 1033, 1038 (5th Cir. 1984); *In re Smith Corset Shops, Inc.*, 696 F.2d 971, 975 (1st Cir. 1982); *Gregson & Associates Architects* v. *Virgin Islands*, 675 F.2d 589, 591-593 (3d Cir. 1982); *Gallimore* v. *Missouri Pac. R.R.*, 635 F.2d 1165, 1169 n.5 (5th Cir. 1981); *Caperton* v. *Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 689 (4th Cir. 1978). See generally 6A J. Moore, *Federal Practice* ¶ 58.02.1, at 58-19, 58-22 (2d ed. 1984). Cf. *In re Ozark Restaurant Equipment Co.*, 761 F.2d 481, 483-484 (8th Cir. 1985).

designed to terminate the litigation, both it and the corresponding docket entry accordingly must, at a minimum, indicate that final judgment has been rendered in the case.[13] See *F. & M. Schaefer Brewing Co.*, 356 U.S. at 234-235.[14] See generally 7 J. Moore, *Federal Practice* (Pt. 2) ¶ 79.02[2], at 79-54 (2d ed. 1986).

Here, of course, the January 4, 1985, judgment and the corresponding docket entry refer only to the attorneys' fee award. Neither makes any mention of the relief awarded on the merits, or indicates even in a general way that final judgment in the case has issued; neither adverts, as Rule 79(a) puts it, to the "substance" of the district court's ruling on any issue other than attorneys' fees. If, as the court of appeals held, such a judgment is enough to set the time for appeal running on the merits, the parties in com-

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[13] "Since the running of time for * * * appeal begins from the entry of judgment, such entry, though not necessarily in any particular forms of words, should be unambiguous on its face so that counsel or a party consulting the docket will have no reasonable basis for doubt as to the nature and effect of what has been done or as to the timeliness of further proceedings." *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580, 582 (3d Cir. 1960).

[14] In *F. & M. Schaefer Brewing Co.*, an action for a monetary recovery, the district court's order and the corresponding docket entry indicated that summary judgment had been granted, although they failed to indicate the amount of the award. The Court held this insufficient to give rise to a final judgment: "Rule 79(a) expressly requires that the clerk's entry 'shall show . . . the substance of [the] judgment of the court. . . .' Surely the amount of a judgment for money is a vital part of its substance. To hold that one must search the whole record to determine the amount, or the facts necessary to compute the amount, of a final judgment for money would be to ignore the quoted provision of Rule 79(a)." 356 U.S. at 234-235.

plex cases presumably will consider themselves obligated to keep track of the outstanding issues and to appeal whenever they believe that the final claim may have been resolved.[15] Such a practice inevitably "would lead to a blizzard of protective appeals as litigants tried to ensure their rights to review; many times the rule also would lead to pointless forfeitures as litigants inadvertently overlooked the possibility that a particular order might be characterized as a 'final decision.'" *Exchange National Bank* v. *Daniels*, 763 F.2d 286, 290 (7th Cir. 1985). The result would be a return "to the melange of guesswork and confusion that antedated the separate-document [requirement]." *United States* v. *City of Kansas City*, 761 F.2d 605, 607 (10th Cir. 1985).

The defects in the court of appeals' approach will be particularly noticeable in a case, such as this one, where the judgment on its face terminates only an attorneys' fee dispute—an issue that is entirely collateral to the merits. See *White* v. *New Hampshire*, 455 U.S. 445, 451-452 & n.14 (1982).[16] The usual rule, as the court of appeals itself acknowledged

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[15] Even then, under the court of appeals' reasoning, their appeal would be appropriate only if the district court had intended the order resolving that claim to serve as the final judgment in the case.

[16] When a district court's judgment disposes of fewer than all of the claims in a case, the losing party may not appeal from that judgment unless the court explicitly certifies that an appeal is warranted. Fed. R. Civ. P. 54(b). See 6A J. Moore, *Federal Practice* ¶ 58.01[1.-2], at 58-4 (2d ed. 1984). As a general matter, a party therefore cannot lose its right to appeal by awaiting entry of judgment on the final claim in the case. The courts have not treated Rule 54(b) as applicable when the unresolved claims are collateral ones, however. See cases cited at page 19, *infra*.

(App., *infra*, 11a), is that the merits and the attorney's fee disputes are independent of one another for Rule 58 purposes, so that the time to appeal from a disposition on the merits begins to run while a request for attorneys' fees is still outstanding. See *Exchange National Bank*, 763 F.2d at 291-292; *International Ass'n* v. *Madison Industries, Inc.*, 733 F.2d 656 (9th Cir. 1984); *Bernstein* v. *Menard*, 728 F.2d 252, 253 (4th Cir. 1984); *Smillie* v. *Park Chemical Co.*, 710 F.2d 271, 273-274 (6th Cir. 1983); *Smith* v. *Mine Safety Appliances Co.*, 691 F.2d 724 (5th Cir. 1982). See generally *White*, 455 U.S. at 452-453 n.14. It stands to reason that the converse situation, involving entry of judgment on a fee award when judgment has not yet been entered on the merits, should not be sufficient to notify a party that the time to appeal on the merits is running.[17]

3. The difficulties created by a test that looks to the district court's intent to determine whether final judgment has been entered, rather than to the objective contents of the judgment and docket entry, are well illustrated by the record here. When the January 4, 1985, order was issued, the district court gave no public indication that it intended the attorneys' fee order to serve as the final judgment on the merits. To the contrary, as the district judge subsequently explained (App., *infra*, 19a), both he and the clerk treated the entry of the January 4, 1985, order as a ministerial act of the sort that is appropriate only when the judgment is for a "sum certain." See Fed. R. Civ. P. 58(1); *Indrelunas*, 411 U.S. at 220; 6A J. Moore, *supra*, ¶ 58.01[1.-2], at

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[17] This is particularly true if, as the court of appeals concluded (App., *infra*, 11a), a fee award may precede the entry of final judgment on the merits.

58-5, 58-7; ¶ 58.04[4.-2], at 58-45 to 58-46. And the district court later confirmed that no final judgment had issued on the merits: in rejecting the government's Rule 60(b) motion, the judge indicated that the entry of judgment awarding attorneys' fees had been appropriate not because it was part of a final judgment, but because the fee award was *collateral* to the merits.[18] Given this, it is not surprising that respondents themselves, in their pleadings before the court of appeals, were unable to identify with certainty the single document representing the final judgment in the case.[19]

In holding that the district judge intended the January 4, 1985, order to serve as the final judgment here, the court of appeals relied principally on an internal court memorandum accompanying that judgment, which indicated that the district judge expected the fee award to close the case. But a final judgment test that requires consideration of internal housekeeping documents is hardly consistent with the Rules' focus on clarity; the application of such a test inevitably would frustrate Rule 79(a)'s "public

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[18] The court explained at the time that "a formal judgment was never entered after our November 17, 1983 opinion" granting summary judgment on the merits (App., *infra*, 19a n.1). Indeed, when the district court subsequently denied the government's motion for entry of a final order on the merits in October 1985, it did not suggest that such a judgment already had been entered; instead, it expressed its view that its ruling on the merits "was by law immediately appealable * * * 22 months ago," adding that "[d]uring that period no appeal was taken and no action by [the government] to enter final judgment [*sic*]" (*id.* at 14a).

[19] Respondents argued that judgment had been entered either at the time of the dismissal of their individual damages claims or at the time of the attorneys' fee award. Memorandum of Law in Support of Plaintiffs-Appellees' Motion to Dismiss 5.

recordkeeping function," while failing to "giv[e] notice to the losing party that a final decision has been entered against it." *Bankers Trust Co.*, 435 U.S. at 384 n.4. Indeed, while the district court may well have believed the attorneys' fee order to be the final judgment in the case, "the question is not beyond dispute * * *. It is precisely this kind of uncertainty about whether the District Court intended to enter a final order that warrants the mechanical application of Rule 58." *Diamond*, 770 F.2d at 230 (footnote omitted).[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

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[20] This case also forcefully demonstrates the consequences of a misapplication of Rules 58 and 79(a). HHS informs us that cross-program recovery currently is in effect in 48 states; the district court's holding on the merits in this case, which forecloses use of the cross-program mechanism in New York, thus detracts from the uniformity of a nationwide program—and does so, HHS reports, in a manner that costs the government approximately $1.5 million annually. Yet the court of appeals' holding prevents the government from even attempting to rectify this problem.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April, one thousand nine hundred and eighty-six.

Present: HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
Circuit Judges,

No. 85-6332

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWBRIDGE, LOIS W. BRUNJES, and VERLY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

v.

RICHARD W. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, JOHN SVAHN, and MARTHA MCSTEEN, individually and as Commissioner of the Social Security Administration, DEFENDANTS-APPELLANTS

[Filed Apr. 28, 1986]

Appeal from the United States District Court for the Southern District of New York

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This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal be and it hereby is dismissed as moot.

Defendants-appellants Richard W. Schweiker, *et al.* (collectively the "Secretary"), appeal from an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, denying their March 28, 1985 motion for entry of a final judgment in the present action. For the reasons below, we dismiss the appeal as moot.

In a related appeal, No. 85-6274, filed on September 17, 1985, the Secretary sought review of other rulings of the district court in the present action, including an injunctive order entered in November 1983 and an order entered in July 1985 denying the Secretary's motion pursuant to Fed. R. Civ. P. 60(b) to vacate a judgment entered in the action in January 1985. Plaintiffs moved in this Court to dismiss so much of the Secretary's appeal in No. 85-6274 as sought review of the November 1983 order, contending that final judgment had been entered in the action more than 60 days prior to the September 1985 notice of appeal. The Secretary has recognized in his brief on the present appeal that the principal question presented here, *i.e.*, whether a final judgment had been entered in the district court prior to his motion for the entry of such a judgment, was already before this Court in connection with plaintiffs' motion to dismiss in No. 85-6274.

In a decision filed on January 15, 1986, we granted plaintiffs' motion to dismiss in No. 85-6274, ruling

that a final judgment had been entered in the district court no later than January 4, 1985. *Ellender v. Schweiker*, 781 F.2d 314 (2d Cir. 1986). Accordingly, the present appeal from the denial of the Secretary's March 1985 motion for entry of judgment became moot.

Our granting of plaintiffs' motion to dismiss in No. 85-6274 did not dispose of the Secretary's entire appeal therein but left outstanding his challenge to the district court's denial of his Rule 60(b) motion to vacate the final judgment that had been entered. We are informed, however, that the Secretary has abandoned what remained of his appeal in No. 85-6274. Whatever arguments the Secretary might have advanced in favor of the revival of his rights to have reviewed any decision of the district court made prior to entry of the January 1985 judgment could have been made in No. 85-6274. Those arguments may not be made here.

The present appeal is dismissed as moot.

/s/ Thomas J. Meskill
THOMAS J. MESKILL, U.S.C.J.

/s/ Jon O. Newman
JON O. NEWMAN, U.S.C.J.

/s/ Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 1985

Docket No. 85-6274

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWBRIDGE, LOIS W. BRUNJES, and VERLEY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

v.

RICHARD W. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, JOHN SVAHN, and MARTHA MCSTEEN, Individually and as Commissioner of the Social Security Administration, DEFENDANTS-APPELLANTS

(Argued: November 12, 1985 Decided: Jan. 15, 1986)

Before: TIMBERS, KEARSE, and PRATT, *Circuit Judges.*

Motion to dismiss so much of appeal as seeks review of order entered in November 1983, on ground that final judgment was entered more than 60 days prior to present notice of appeal.

Motion granted.

TOBY GOLICK, New York, New York (Cardozo Bet Tzedek Legal Services, New York, New York, Joan Mangones, Lester Helfman, The Legal Aid Society, Staten Island, New York, John E. Kirklin,

Nancy Morawetz, The Legal Aid Society, New York, New York, on the brief), *for Plaintiffs-Appellees.*

STEPHEN E. OBUS, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Jane E. Booth, Assistant United States Attorney, New York, New York, on the brief), *for Defendants-Appellants.*

KEARSE, *Circuit Judge*:

Plaintiffs-appellees Dorothy Ellender, *et al.*, in this action brought to challenge certain practices of defendants-appellants Richard W. Schweiker, as Secretary of the Department of Health and Human Services, *et al.* (collectively the "Secretary"), have moved to dismiss the Secretary's appeal insofar as it seeks review of a decision of the district court, Irving Ben Cooper, *Judge*, dated November 17, 1983. Plaintiffs contend that a final judgment was entered in the action no later than January 4, 1985, that no notice of appeal was filed by the Secretary until more than 60 days thereafter, and that this Court thus lacks jurisdiction of the present appeal insofar as it seeks review of that final judgment or any prior order. We agree and grant the motion.

BACKGROUND

Plaintiffs commenced this action in 1982 to challenge a program of the Secretary to recover alleged overpayments of supplemental security income ("SSI") benefits from certain former SSI recipients. They contended that the recovery program was unlawful and that the notices sent by the government were constitutionally deficient, and they sought declaratory and injunctive relief, money damages, and

attorneys' fees. Plaintiffs successfully moved for partial summary judgment, and on November 17, 1983, Judge Cooper entered a memorandum and order that permanently enjoined the challenged practices ("November 1983 Order"). The Secretary, who earlier had been temporarily restrained from continuing the challenged practices, complied with the November 1983 Order. The Secretary made no attempt to obtain immediate appellate review of that order.

The November 1983 Order left outstanding claims by plaintiffs for monetary relief and attorneys' fees. Plaintiffs promptly moved for an award of fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1982). The court granted the motion in part in April 1984 and directed the parties to negotiate the amount of fees to be paid. The parties reached agreement on amount, and a stipulation was so-ordered by the court in July 1984. Assistant United States Attorney Steven Obus then informed plaintiffs' counsel that no payment of the agreed fees would be made prior to entry of a judgment ordering such payment. Plaintiffs' counsel pointed out that plaintiffs still had individual damage claims outstanding but advised Obus that she did not believe plaintiffs would pursue these claims. Thereafter, the parties stipulated that all of plaintiffs' remaining claims would be discontinued and dismissed, and this stipulation was so-ordered and entered on December 19, 1984 ("December 1984 Order").

Plaintiffs then conferred with the clerk of the court in an attempt to have a judgment entered ordering the Secretary to pay the agreed-upon fees. After plaintiffs had submitted to the clerk the court's opinion awarding fees, the so-ordered stipulation as to amount, and a judgment form in accordance with the

Appendix of Forms annexed to the Federal Rules of Civil Procedure, these papers apparently were submitted to Judge Cooper, who signed a judgment dated January 4, 1985 ("Judgment"), which read as follows:

> Upon the annexed opinion and order of the Court entered April 12, 1984 and the annexed stipulation and order entered July 20, 1984 it is
>
> Adjudged that the plaintiffs' counsel do have and recover of the defendants the sum of $40,734.30.

Judge Cooper sent the Judgment to the clerk of the court, accompanied by a memorandum that read as follows:

> This judgment closes this case. If for any reason this action cannot be closed, please advise Chambers immediately by calling Law Clerk at Ext. 0972. Thank you.

The clerk noted in the civil docket for January 3, 1985, the entry of a "JUDGMENT" and described the substance of the Judgment. The docket entries contain the further notation "m/c", which is the clerk's abbreviation for "mailed copies", indicating that copies of the Judgment were mailed to counsel for the parties. The New York Law Journal for January 8, 1985, contained a notice that an order had been signed in this case.

The government attorneys, however, apparently did not become aware of the entry of the January 4, 1985 Judgment until March 8, 1985, some 64 days after the date of its entry. On March 28, the Secretary moved pursuant to Fed. R. Civ. P. 60(b) for vacation of the January 4 Judgment and for entry of a new judgment that would expressly mention,

inter alia, each of the dispositions made of plaintiffs' claims. The court denied the motion to vacate on July 19, 1985, and eventually denied the motion for entry of a new judgment as proposed by the Secretary. On September 17, 1985, the Secretary filed the present notice of appeal, seeking review of, *inter alia*, the November 1983 Order and the July 1985 denial of the motion to vacate the January 4, 1985 Judgment.

Plaintiffs contend that the final judgment in the action was the December 1984 Order, since that disposed of all outstanding claims that were not collateral to the merits of the case, or, alternatively, that the January 4, 1985 Judgment was the final judgment. In either event, plaintiffs contend that this Court has no jurisdiction to entertain the Secretary's challenge to the November 1983 Order since no notice of appeal was filed until September 1985. While the December 1984 Order technically may not meet the requirements for a final judgment, we conclude that the January 4, 1985 Judgment was a final judgment. As that Judgment was entered more than 60 days prior to the Secretary's filing of his notice of appeal, we agree with plaintiffs that we lack jurisdiction to entertain an appeal challenging the Judgment or any orders that preceded it.

DISCUSSION

Section 1291 of 28 U.S.C. provides that the courts of appeals have jurisdiction of appeals from all final decisions of the district courts. In a civil case in which an officer or agency of the United States is a party any appeal from a final judgment must be brought within 60 days after entry of such judgment. Fed. R. App. P. 4(a). If notice of appeal is not filed

within the time specified by Fed. R. App. P. 4, the court of appeals lacks jurisdiction to hear the appeal. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 514 (2d Cir. 1985). The questions on this motion are whether either the December Order or the January 4, 1985 Judgment was a "judgment" within the meaning of Fed. R. Civ. P. 58, and if either was, whether it was a "final" judgment within the meaning of § 1291.

Rule 58 requires that every judgment be set forth on a separate document, and it provides that a judgment is not effective unless entered as provided in Fed. R. Civ. P. 79(a). Rule 79(a) provides, in pertinent part, that the clerk of the court is to enter a judgment in the civil docket for the case, briefly showing its substance and date of entry. The purpose of these requirements is to enable a party to know when the court regards the case as closed and intends that no further action be taken, and thus to know when the time to appeal has commenced to run. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-86 (1978) (per curiam); *Leonhard v. United States*, 633 F.2d 599, 611 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

The December 1984 Order, which disposed of the last of the noncollateral claims in the case, could properly have led to the entry of a final judgment. *See White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 452 n.14 (1982) (judgment disposing of all claims except statutory entitlement to attorneys' fees is final for purposes of appealability). It is unclear, however, whether the December 1984 Order itself should be considered a judgment in compliance with Rule 58, since the

court's order was merely endorsed on a stipulation and was not set forth in a separate document. We are inclined to believe that the December 1984 Order did not meet the requirements of Rule 58.

The January 4, 1985 Judgment, however, met all of the requirements of Rules 58 and 79(a). It was set out in a separate document, and its contents were summarized in the clerk's docket for the case. It thus was a "judgment" within the meaning of the Rules.

When a judgment has been so set forth and docketed, the question remains whether or not it was final within the meaning of 28 U.S.C. § 1291. The teaching of the Supreme Court is that the determining factor is "whether the district court intended the judgment to represent the final decision in the case." *Bankers Trust Co. v. Mallis*, 435 U.S. at 385 n.6.

In the present case we have little difficulty in concluding that the district court intended the January 4, 1985 Judgment to be the final decision in the case. The memorandum sent by Judge Cooper to the clerk with the Judgment stated precisely that the accompanying Judgment "close[d] this case." This was consistent with the events that had preceded it: The November 1983 Order had disposed of the main claims in the case; the April 1984 opinion and the July 1984 so-ordered stipulation as to the award and amount of fees, respectively, had resolved all issues as to fees; and the December 1984 Order had discontinued all of the remaining claims. There was nothing left for the court to do. Its accompanying memorandum accordingly stated explicitly that the Judgment closed the case. Nothing more was required to imbue the January 4, 1985 Judgment with finality.

In opposition to the present motion, the Secretary argues, *inter alia*, that the January 4, 1985 Judgment was merely a collateral order disposing only of the matter of attorneys' fees, that it was entered in violation of Fed. R. Civ. P. 54(b), and that no final judgment ever was entered. None of the Secretary's arguments has merit.

It is true that an award of attorneys' fees pursuant to a statutory provision allowing such an award is considered to be collateral to the merits of the case and that a judgment disposing of the merits may be a final judgment for purposes of § 1291 although the matter of fees remains outstanding. *See White v. New Hampshire Department of Employment Security*, 455 U.S. at 452 n.14. We see no reason, however, why an award of fees may not be made prior to or simultaneously with the entry of final judgment. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4997 (requirement of § 2412(d)(1)(B) that party seeking an award of fees apply to court within 30 days of final judgment "should not be construed to require a final judgment on the merits before a court may award fees"). When all issues as to the merits have been decided and a judgment is entered by which the court clearly intends to close the case, *i.e.*, to enter a final judgment, the fact that that judgment disposes of the matter of fees does not make the judgment less final.

Nor does Rule 54(b) have any bearing on the finality of the January 1985 Judgment. That Rule requires that when an order of the court has disposed of fewer than all of the claims in the case or has determined the rights of fewer than all of the parties, leaving other rights to be determined, the order is

not appealable absent a certification by the court that there is no just reason for delay in the entry of a final judgment as to that portion of the case that has been finally adjudicated. The Rule has no application to an order that finally disposes of the last remaining issue in the case and that is expressly intended by the court to close the case. *See* 6 *Moore's Federal Practice* ¶ 54.27[3], at 334 (2d ed. 1985) ("[T]he Rule does not contemplate a certificate when the district court has adjudicated *all* the claims . . . .") (emphasis in original); *id.* ¶ 54.34[1], at 522-23 ("When the court has fully adjudicated all of the claims no certificate is necessary to make that adjudication final.").

In arguing that no final judgment ever was entered, the Secretary relies principally on a statement made by Judge Cooper in his order dated July 15, 1985, denying the Secretary's Rule 60(b) motion to vacate the January 4, 1985 Judgment, that "a formal judgment was never entered after our November 17, 1983 opinion." We suspect that by this, Judge Cooper meant that a separate document formalizing the terms of the November 1983 Order was never entered. One cannot reasonably conclude, however, that no final judgment in the case was ever entered, given the court's explicit statement to the clerk, accompanying the January 4, 1985 Judgment, that that Judgment closed the case. While we would normally expect that the final judgment in an action would at least mention the permanent relief granted by the court, and this would be the better practice when no other document has been entered as a separate order setting forth the terms of such relief, we find no requirement in the Federal Rules of Civil Procedure that the document that constitutes the final

judgment in a case be comprehensive. The dispositive fact in the present case is that the record reveals that the district court "intended the [J]udgment to represent the final decision in the case." *Bankers Trust Co. v. Mallis*, 435 U.S. at 385 n.6.

The Secretary does not contend that there were any issues remaining to be adjudicated after December 1984, and we have little doubt that if the government attorneys had followed up on the notice published in the New York Law Journal on January 8, 1985, or had read the January 4 Judgment and the court's memorandum that accompanied it, they could not have failed to recognize that the final judgment in the case had been entered. Their failure to become aware that such a judgment has been entered does not lessen the judgment's finality.

Whether, because of his failure to become aware of the entry of a final judgment, the Secretary is entitled to relief from the Judgment is a matter properly dealt with in a motion pursuant to Rule 60(b). The district court denied the Secretary's Rule 60(b) motion, and the Secretary's appeal from that ruling, notice of which was filed within 60 days of the denial, is properly before this Court. The challenge to the Rule 60(b) decision will be heard by a panel in due course, and we express no view as to its merits.

CONCLUSION

Plaintiffs' motion to dismiss so much of the Secretary's appeal as seeks review of orders or judgments entered more than 60 days prior to the filing of the present notice of appeal is granted.

APPENDIX C

We decline to enter the proposed final judgment submitted by defendant. Our order (supported by our opinion) filed November 17, 1983 permanently enjoining defendants' challenged practices was by law immediately appealable pursuant to 28 U.S.C. § 1292(a)(1) 22 months ago. During that period no appeal was taken and no action by defendants to enter final judgment [*sic*]. We are compelled to note that defendants initiated no steps whatever either with respect to our opinion filed April 12, 1984 or the stipulation filed on July 20, 1984, both relating to attorneys' fees and costs. We make the same comment with respect to the stipulation filed on December 19, 1984 dismissing plaintiffs' outstanding claims for damages. Defendant has offered no justification or excuse for its failure to proceed as hereinabove indicated. *See L.Z.* v. *Parrish*, 733 F.2d 585, 589 (8th Cir. 1984).

SO ORDERED:

New York, N.Y.
October 7, 1985

/s/ Irving Ben Cooper
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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82 Civ. 4816 (IBC)

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWBRIDGE, LOIS W. BRUNJES, and VERLY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS

—against—

RICHARD S. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, JOHN SVAHN, and MARTHA MCSTEEN, individually and as Commissioner of the Social Security Administration, DEFENDANTS

[Filed July 19, 1985]

MEMORANDUM

IRVING BEN COOPER, D. J.

Defendants move for an order pursuant to Fed. R. Civ. P. 60(b)(1), (3), (4) and (6) vacating our judgment granting to plaintiffs attorneys' fees filed in this action January 3, 1985. Plaintiffs oppose the motion.

Our October 26, 1982, we granted plaintiffs' motion for a preliminary injunction and for class certi-

fication. On November 17, 1983 we granted in part and denied in part plaintiffs' motion for partial summary judgment based upon defendant's practice of recouping overpaid Supplemental Security Income benefits from plaintiffs' Old Age, Survivors and Disability Insurance benefits; at the same time we denied defendants' motion for summary judgment.

This was followed (on December 20, 1983) by a motion by plaintiffs for reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"). That application we granted in part and denied in part in an opinion dated April 12, 1984. In accordance with the suggestion of the parties, we did not fix the amount of the fee award so as to enable counsel to "get together" and agree thereon. This the parties effectuated, and by stipulation filed July 20, 1984 fixed attorneys' fees and costs at $40,734.30. Finally, by stipulation filed December 19, 1984, plaintiffs dismissed their outstanding claims for damages.

Not having received the amount owing in attorneys' fees, counsel for plaintiffs, Toby Golick, Esq., called the matter to the attention of counsel for the Government, Assistant United States Attorney Steven Obus, who responded that "the defendants required a judgment prior to paying the amount agreed to, since the stipulation fixing the amount of fees did not explicitly direct that payment be made." (Declaration of Toby Golick, Esq., dated April 22, 1985, ¶ 4 at 2; *see* Declaration of Steven E. Obus, Esq., dated March 28, 1985, ¶ 5 at 2) Thereafter, Ms. Golick pursued the following course of action:

> 6. . . . I referred to the Federal Rules of Civil Procedure, Rule 58 which provides that: "upon a decision by the court that a party shall re-

> cover only a sum certain . . ., the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the Court." I therefore concluded that the clerk should enter the judgment herein, and I telephoned the judgment clerk to request that this be done.
>
> 7. The individual I spoke to, requested that I bring to the judgment Clerk's office (1) the opinion stating that plaintiffs are entitled to fees; (2) the stipulation as to the amount of the fees; and (3) a judgment form. . . .
>
> 8. Thereupon, as directed by the clerk, I brought a judgment following [the form suggested by the clerk], the stipulation and opinion to the judgment clerk's office. There an individual identifying himself as the Assistant Judgment Clerk checked the form and stated that the judgment should be signed by the judge. He then crossed out the words "Clerk of the Court" below the signature line and wrote in "United States District Judge."
>
> 9. The judgment . . . indicates that it was entered on January 3, 1985. Notice of the signing of the judgment appeared in the New York Law Journal on January 8, 1985. . . . Entry of the judgment was made on the docket sheet. . . .

Declaration of Toby Golick, Esq., dated April 22, 1985, at 2-3.

The Government contends that the judgment for attorneys' fees entered in this case violated Fed. R. Civ. P. 54(b), and Civil Rule 8 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York; further, that the

Court lacked subject matter jurisdiction over the issue of attorneys' fees.

The Law

Fed. R. Civ. P. 54(b) provides, *inter alia*, that when more than one claim for relief is presented in an action the Court may direct the entry of a final judgment as to one or more but fewer than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. However, in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), the Supreme Court formally created what came to be known as the doctrine of "collateral orders"; it allows for appeal of a final decision of an order that is a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." In a recent case, the Supreme Court found that an award of attorneys' fees in a civil rights action falls within the collateral orders doctrine. *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 451 (1982). This conclusion has also been invoked by our Circuit Court of Appeals. *See McGill* v. *Secretary of Health and Human Services*, 712 F.2d 28, 29 (2d Cir. 1983) *cert. denied*, 104 S. Ct. 1420 (1984); *Hastings* v. *Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982).

Since there is much similarity between the relevant portions of the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988, and the Equal Access to Justice Act, 28 U.S.C. § 2412, under which we awarded attorneys' fees herein, we arrive at the conclusion that our opinion awarding attorneys' fees to plaintiffs was a collateral order. Consequently, judg-

ment was appropriately entered on that issue, and it became appealable on the date judgment was entered. We therefore deny defendants' motion to vacate the judgment on the basis of Fed. R. Civ. P. 54(b).[1]

Defendants next contend that Civil Rule 8 of the local rules of our District which provides for the submission of orders, judgments and decrees, requires us to vacate the judgment. However, we agree with plaintiffs that Rule 8 is not operative here since the judgment filed was one which the local rules contemplate would be prepared as a ministerial act by the Court clerk pursuant to Fed. R. Civ. P. 58. Indeed, our own independent inquiry of the clerk's office regarding the proper procedure to be followed in such instances disclosed that the judgment here was properly entered—a procedure long followed by that office. Furthermore, the mere fact that defendants did not receive notice of the entry of the judgment in the specific manner set forth in Rule 8 does not warrant our vacating it, particularly in light of the fact that the filing was duly published on January 8, 1985 in the New York Journal. We believe that any other interpretation would open the floodgates to judgments long left sleeping, causing judgments to be set aside and permitting time to appeal to run anew. Accordingly, we deny defendants motion to vacate on the basis of Rule 8.

Defendants' final contention, submitted in a supplemental memorandum filed May 15, 1985 (20 days

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[1] We note that a formal judgment was never entered after our November 17, 1983 opinion permanently enjoining defendants' challenged practices. However, we are compelled to point out that this decision was immediately appealable 19 months ago pursuant to 28 U.S.C. § 1292(a)(1).

after the return date) is that this Court lacks subject matter jurisdiction to enter the judgment because the motion for attorneys' fees was not filed "within thirty days of final judgment" as required by 28 U.S.C. § 2412(d)(1)(B), but instead was filed before any judgment was filed. Defendant relies largely on the interpretation of this statute by the Ninth Circuit Court of Appeals in *Auke Bay Concerned Citizens' Advisory Council* v. *Marsh*, 755 F.2d 717 (9th Cir. 1985).

As pointed out in a letter to the Court dated June 13, 1985 by one of the attorneys for plaintiffs, Nancy Morawetz, Esq., Congress has specifically rejected defendants' approach. House Report on H.R. 2378, a bill to amend the Equal Access to Justice Act, states, *inter alia*:

> Fee petitions may be filed before a "final judgment." If the court determines that an award of interim fees is inappropriate the petition should be treated as if it were filed during the thirty-day period following the final decision. The overly technical approach in *Auke Bay Concerned Citizens' Advisory Council* v. *Marsh*, 755 F.2d 717 (9th Cir. 1985) should be avoided.

Although this bill has not yet been enacted, it provides evidence of Congress' intent. *See Taylor* v. *United States*, 749 F.2d 171 (3d Cir. 1984) (relying on unenacted amendments to the EAJA to interpret the term "final judgment" in the original EAJA).

Moreover, as plaintiffs note, Congress never intended that a formal final judgment would be required before the parties apply for fees. The legislative history accompanying the statute specifically states:

> Under Section 2412(d)(1)(B), a party seeking an award of fees must apply to the Court within 30 days of final judgment. This language, however, should not be construed to require a final judgment on the merits before a court may award fees.

H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 18, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4997. The legislative history further states that: "[a] fee award may be . . . appropriate where the party has prevailed on an interim order which was central to the case . . . ." *Id.* at 11, *reprinted in* [1980] U.S. Code Cong. & Ad. News at 4990.

In short, we find that plaintiffs' timely petitioned for attorneys' fees; consequently we decline to vacate the judgment on the ground of lack of subject matter jurisdiction.

CONCLUSION

Defendants' motion to vacate the judgment for attorneys' fees filed on January 3, 1985 is denied in all respects.

SO ORDERED:

New York, N.Y.
July 15, 1985

/s/ Irving Ben Cooper
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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82 Civ. 4816 (IBC)

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWBRIDGE, LOIS W. BRUNJES, and VERLY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS

—against—

RICHARD S. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, MARTHA MCSTEEN as Commissioner of the Social Security Administration, and JOHN A. SVAHN, DEFENDANTS

[Filed Jan. 3, 1985]

JUDGMENT

Upon the annexed opinion and order of the Court entered April 12, 1984 and the annexed stipulation and order entered July 20, 1984 it is

Adjudged that the plaintiffs' counsel do have and recover of the defendants the sum of $40,734.00.

Dated: NYC, NY
Jan. 4, 1985

/s/ Irving Ben Cooper
USDJ

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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82 CIV 4816 (IBC)

DOROTHY ELLENDER ET AL., PLAINTIFFS

—against—

RICHARD S. SCHWEIKER ET AL., DEFENDANTS

[Filed Dec. 29, 1984]

STIPULATION OF DISCONTINUANCE
OF DAMAGE CLAIMS

IT IS HEREBY STIPULATED by and between the parties hereto that the named plaintiffs' and named intervenor-plaintiffs' individual damage claims against the defendants herein are discontinued and dismissed.

/s/ Toby Golick
TOBY GOLICK
LEGAL SERVICES FOR THE ELDERLY
132 West 43rd Street—3rd Fl.
New York, N.Y. 10036

Attorney for Plaintiffs

/s/ Steven E. Obus
RUDOLPH W. GIULIANI
United States Attorney
for the Southern District of N.Y.

By: STEVEN E. OBUS
Assistant U.S. Attorney
1 St. Andrew's Plaza
New York, N.Y. 10007

Attorney for Defendants

SO ORDERED:

/s/ Irving Ben Cooper
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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82 CIV 4816 (IBC)

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWRIDGE, LOIS W. BRUNJES, and VERLY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS

—against—

RICHARD S. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, MARTHA MCSTEEN as Commissioner of the Social Security Administration, and JOHN A. SVAHN, DEFENDANTS

[Filed July 20, 1984]

STIPULATION AND ORDER

Plaintiffs having moved for an award of reasonable attorneys' fees and costs pursuant to 28 U.S.C. § 2412, and defendants having opposed such an award, and the Court having determined in an Opinion dated April 10, 1984 that attorneys' fees and costs are payable with respect to certain of plaintiffs' claims but not with respect to others, and the Court having directed the parties to attempt to resolve the amount of attorneys' fees and costs payable to plaintiffs in accordance with the guidelines set forth in the Court's April 10, 1984 Opinion, it is hereby stipulated and agreed that:

1. The total amount of costs and attorneys' fees payable to plaintiffs under the Court's April 10, 1984 Opinion is $40,734.30; and

2. The above-mentioned costs and fees shall be apportioned among plaintiff's counsel as follows:

Legal Services for the Elderly	$18,003.85
The Legal Aid Society	19,845.47
Brooklyn Legal Services, Corp. B	2,017.21
National Senior Citizens Law Center	967.77

Dated: New York, New York
July 12, 1984

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ Steven E. Obus
STEVEN E. OBUS
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9168

LEGAL SERVICES FOR THE ELDERLY
Attorney for Plaintiffs

By: /s/ Toby Golick
TOBY GOLICK
132 West 43rd Street
New York, New York 10036
Telephone: (212) 391-0120

So Ordered: Jul. 16, 1984

/s/ Irving Ben Cooper
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 82 Civ. 4816 (IBC)

DOROTHY ELLENDER, ANGELA ZAMSKI, JAMES TROWRIDGE, LOIS W. BRUNJES, and VERLY SMITH, individually and on behalf of all others similarly situated, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, MARGARET M. HECKLER, as Secretary of the Department of Health and Human Services, JOHN SVAHN, and MARTHA MCSTEEN, individually and as Commissioner of the Social Security Administration, DEFENDANTS

Nov. 17, 1983

OPINION

IRVING BEN COOPER, District Judge.

Plaintiffs seek an order for partial summary judgment, pursuant to Rule 57 of the Federal Rules of Civil Procedure, granting declaratory and injunctive relief against defendants' policies and procedures for collecting plaintiffs' alleged debts under the Supplemental Security Income (SSI) program by deductions from benefits due them under the Old Age, Survivors and Disability (OASDI) program. Additionally, plaintiffs seek an order, pursuant to Rule 24(a)(2) or 24(b)(2), to permit Jessie Savage to intervene as

a plaintiff in this action. Defendants have cross-moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the complaint.

I. *The Facts*

The facts of the case are generally not in dispute and have been set forth in our previous opinion granting plaintiffs' motion for class certification, intervention, and a preliminary injunction. *See Ellender v. Schweiker*, 550 F. Supp. 1348 (S.D.N.Y. 1982). To better understand our decision which follows, however, we believe appropriate a brief reiteration of the facts leading up to the necessity of this litigation. As we set forth in our previous opinion,

> The SSI program is a federally-funded public assistance program established under Title XVI of the Social Security Act. It provides minimum subsistence benefits to persons under 65 who are blind or disabled and whose other incomes and resources fall below a prescribed level set by statute.
>
> The [OASDI] program, established under Title II of the Social Security Act, is an insurance program which provides retirement, disability and survivor benefits to former wage earners who have contributed to the program for a sufficient number of calendar quarters. Once an eligible wage earner can no longer work due to age, disability, or death, funds are paid to him or his survivors from the OASDI 'trust fund' administered by the Social Security Administration.
>
> Even though both programs are under the auspices of the Social Security Administration, they are separate and distinct, and exist pursu-

> ant to different statutory authority. They have different eligibilty requirements and were designed to serve entirely separate groups. SSI is a needs-based program funded from general revenues. OASDI payments, funded through a trust fund, are based on contributions of the wage earner, number of working years and age of retirement. Aged, blind or disabled OASDI recipiens may be entitled to receive SSI payments in addition provided they meet the prerequisites of that program.
>
> For reasons which remain largely unexplained, between January, 1974 and December, 1975 the Social Security Administration overpaid SSI recipients, including plaintiffs in the instant action. The only explanation for these overpayments in the record before us is that in one instance they resulted from 'computer error.' . . . The total amount of SSI overpayments nationwide was approximately $1 billion as of December 31, 1981.
>
> *Id.* at 1350-51.

All of the plaintiffs are current recipiens of OASDI benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* In addition, all of the plaintiffs were past recipients of benefits based on old age or disability under the SSI program established by Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq. According to the Social Security Administration (SSA) records, each plaintiff was overpaid by the SSI program and has not fully repaid such overpayment.

Defendants have devised a special program, known as the Backlogged Debt Management Project (BDMP), for the purpose of collecting from OASDI recipients

any overpayments made while they were receiving SSI. More specifically, the BDMP was designed to resolve by collection, waiver or write-off 412,683 SSI overpayment cases in a "deferred" or "delinquent" status, with an approximate value of $214 million. Unlike other SSI beneficiaries who had received overpayments (non-BDMPs), the BDMP group never received any notice advising them of the reason for overpayment or the time period of overpayment.

The BDMP utilizes standardized notices that are sent via mail in an attempt to seek reimbursement and eventual collection of overpaid funds. The initial notice which was not received by all of the class members, the "Supplemental Security Income Notice of Overpayment Action," requests repayment of any overpayments, permits the recipient to authorize withholding of OASDI benefits to repay the SSI overpayment, and recites the rights of the recipient to waiver and appeal. The second notice, Supplemental Security Income Notice of Action to Recover Overpayment [hereinafter "For Your Convenience" notice], which for many beneficiaries was the first one received, merely read:

> SUPPLEMENTAL SECURITY INCOME NOTICE OF ACTION TO RECOVER OVERPAYMENT
>
> ---
>
> FROM: Department of Health and Human Services Social Security Administration
>
> 333 Avenue X
> Brooklyn, NY 11223
>
> ---
>
> Date: April 19, 1982
>
> Social Security Number:

There is an outstanding $1954.86 balance on your supplemental security income overpayment due the Social Security Administration.

Please refund the $1954.86 immediately. Make your check or money order payable to the Social Security Administration, social security number ——, and mail it in the enclosed envelope.

If you cannot make full refund at this time, please refund as much as you can and contact us to arrange for refunding the balance. For your convenience, we can withhold the balance of your overpayment from your social security benefit.

If you would like to use this method of repaying your overpayment, please sign the attached statement and return it to us in the enclosed envelope.

If you wish to discuss a different method of repaying the overpayment, call, write or come into this office.

Enclosures 627-3351

_____

Name

_____

SSN

For my convenience, please withhold my full social security benefit each month until my supplemental security income (SSI) overpayment of $——is fully recovered.

_____ _____

Signature Date

_____

If the notices do not cause the recipient to reimburse the government, subsequent notices are sent. The governemnt's guidelines also provide for telephone and personal contact with the individual to resolve the overpayment.

Although we have emphasized the plight of the class members whose daily lives have been severely affected by the Government's Backlogged Debt Management Project, we are compelled to repeat some of the problems they face:

> Dorothy Ellender is a 75 year old widow whose sole present income is a monthly OASDI check for $413.90. She also received benefits under the SSI program between January, 1974 and December 5, 1975 at the monthly rate of $161.85. On October 5, 1978 Mrs. Ellender received a form from the Social Security Administration informing her that she had received a $4,264.95 SSI overpayment during that period. Even though this form advised her that she had a right to appeal the determination of the overpayment or seek a waiver, she did neither because she was no longer receiving SSI payments at that time and felt that the notice was 'entirely erroneous.'
>
> She heard nothing further concerning the alleged overpayment until she received a copy of the notice at issue here on June 8, 1982, which stated that she must refund $4,264.95 '*immediately.*' (emphasis ours) She asserts, 'I was extremely frightened and upset when I received [the notice]. . . . I am having a difficult time managing on my Social Security Widow's benefit check. . . . I could not manage financially if this check was reduced.' Mrs. Ellender further maintains that she understood once she received the

> notice 'that my only choice was either to repay immediately, which is impossible since I do not have the money, or to authorize withholding the money from my Social Security check.'

Ellender v. Schweiker, *supra*, at 1353-54.

Mrs. Ellender's limited economic status is typical of the plight of almost every class member. As discussed in our previous opinion:

> [E]ach plaintiff is elderly, sick and/or infirm, and for each OASDI benefits represent the primary or sole and exclusive means of subsistence and support. . . .
>
> In the main, plaintiffs pay all monthly expenses out of their OASDI check and because of old age and/or disability no other sources of income are available. Further, since the Social Security Administration's overpayment notices fail to inform them of their rights and requisite information, their decision to authorize OASDI reductions never represents a meaningful and voluntary decision; that defendants' frightening, unauthorized and menacing debt collection methods force them into a responsive decision with respect to such overpayments which would prevent them from meeting their monthly expenses. . . .
>
> Although the record fails to disclose the number of SSI overpayment cases in New York and the amount of money claimed by defendants in these cases, its significance would surely be miniscule when compared to the human tragedy of elderly and disabled people deprived of their subsistence incomes. . . .

> As it appears to us, it should be expected that under the special circumstances here revealed embracing the vast majority affected by defendants' procedures, there is bound to ensue a sharp increase in the amount and degree of physical and mental illness affecting such recipients, accompanied by anguish precipitated and even pushed to the breaking point—to say nothing of the staggering cost increase entailed by the Government.

Id. at 1353, 1357, 1358, 1361.

A more extensive presentation of other class members has been set forth in our prior opinion.

On August 12, 1982 Chief Judge Motley granted a temporary restraining order enjoining defendants "from reducing the OASDI [Title II] grant of any plaintiff or member of the proposed plaintiff class who has received a notice from defendants in the form shown in [the 'For Your Convenience' notice]," "pending the hearing and determination of the plaintiffs' motion for preliminary injunction."

Pursuant to the order, defendants refrained sending supplemental notices in connection with the BDMP and ceased withholding Title II benefits from those BDMP recipients who agreed orally or in writing to repay any Title XVI overpayment through future Title II benefits.

On October 26, 1982 we issued our opinion granting plaintiffs' motion to certify a class of "all persons in New York who currently receive OASDI benefits pursuant to 42 U.S.C. § 1381 *et seq.* and who have been or will be informed [either orally or in writing] that they must refund alleged overpayments of SSI benefits either by direct repayment or by agreeing to

recovery of the overpayment from their monthly OASDI benefits," 550 F.Supp. at 1361, and permitting the intervention of additional plaintiffs. As part of that same opinion we granted the plaintiffs' motion for a preliminary injunction enjoining defendants from reducing the OASDI grant of any class member and denied the defendants' motion to dismiss except as to plaintiffs' claims for punitive damages. 550 F.Supp. at 1357, 1361.

On November 9, 1982 defendants filed a motion to reargue the Court's decision insofar as it denied defendants' motion to dismiss plaintiffs' claims for compensatory damages allegedly arising out of constitutional violations. This motion was withdrawn on April 14, 1983 by consent of the respective parties.

Subsequent to our opinion, the parties engaged in discussions aimed at resolving many of the issues raised by plaintiffs' complaint. To that end, conferences with the Court were held; the parties also requested several postponements on the settlement date of plaintiffs' proposed order and thereafter requested that the Court hold plaintiffs' proposed order in abeyance pending further notice from either of the parties. *See* Jamie Vincent Gregg's letter to the Court of November 15, 1982. It was not until June 27, 1983 that plaintiffs renewed their request to settle the order. In her letter of June 27, 1983 to the Court, Toby Golick, Esq., attorney for plaintiffs, advised the Court that although the parties agreed on a number of matters, the issue of whether cross-program recovery is permitted still remained unresolved and that plaintiffs would be renoticing the order for settlement on July 8. Additionally, plaintiffs made known their intention to move for partial summary judgment.

Further written communications were received from defendants' attorney, Jamie Vincent Gregg,

Esq., Assistant United States Attorney, on July 8, 1983 requesting a brief delay in signing plaintiffs' proposed order for several reasons: (1) the intention of defendants to submit cross-motions for summary judgment, (2) the short delay requested would not unduly prejudice plaintiffs, given their long acquiescence to the present status quo, and (3) Mr. Gregg's departure from the United States Attorney's Office as of August 1, 1983 would require his successor to become familiar with this complex matter. In response to Mr. Gregg's letter, Ms. Golick wrote the Court on July 13 advising us of her intention to move to intervene on behalf of a group of proposed plaintiffs alleged to be part of the class defined in our October 26, 1982 opinion.

On July 22 and 23 plaintiffs filed motions for partial summary judgment and intervention respectively. Defendants filed their motion for summary judgment dismissing the complaint on September 13.

II. *The Law*

Before addressing the legality of cross-program recovery, the constitutionality of defendants' notices and the correctness of retroactive repayments, we must set forth the basis of jurisdiction and the constituency of the class.

A. *Jurisdictional Basis*

Jurisdiction over the plaintiffs' claims is grounded on mandamus, 28 U.S.C. § 1361, added by the Mandamus and Venue Act of 1962, 76 Stat. 744.[1] Social

[1] Section 1361 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

security benefit cases predicated on mandamus jurisdiction are not a new phenomenon in this Circuit. *See, e.g., Ellis v. Blum,* 643 F.2d 68, 78 (2d Cir. 1981); *Barnett v. Califano,* 580 F.2d 28, 31 (2d Cir.1978); *White v. Mathews,* 559 F.2d 852, 856 (2d Cir.1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); *Frost v. Weinberger,* 515 F.2d 57, 62 (2d Cir.1975), *cert. denied,* 424 U.S. 958, 96 S.Ct. 1435, 47 L.Ed.2d 364 (1976). Indeed, our Court of Appeals has held on several occasions that mandamus jurisdiction is appropriate to review procedures of the SSA Secretary regardless of the facially restrictive jurisdictional bases for evaluating social security claims provided in the Social Security Act.[2] *See Ellis v. Blum, supra,* at 82; *Barnett v. Califano, supra; White v. Mathews, supra.* Accordingly, we do not hesitate to base jurisdiction on the mandamus statute.

B. *Class Constituency*

In November 1982, subsequent to our aforementioned opinion, defendants advised plaintiffs that a group of persons was discovered who had consented to cross-program recovery prior to the BDMP (non-BDMPs). Although defendants requested consensual

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[2] Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) provides, in relevant part, "Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action . . . brought in the district court of the United States . . ."

Furthermore, section 205(h), 42 U.S.C. § 405(h), provides, in relevant part: ". . . No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title."

modification of the injunction, plaintiffs did not consent to such a modification, *see* Plaintiffs' Memorandum of Law in Support of Motion to Intervene, page 3, and instead sought to have the non-BDMPs intervene.

The two groups are distinguishable by the notices sent to the beneficiaries. The notices received by the non-BDMPs advised the recipients of: (1) the amount of overpayment, (2) period in which it occurred, (3) reason for the overpayment, (4) statement of the recipient's right to appeal and/or reconsideration, and (5) the conditions requisite to waive the repayment. In comparison, members of the BDMP group who received the most complete notices were still only informed of the amount of overpayment and their rights to appeal and waiver; many who received no more than the "For Your Convenience" form were not told of their appeal and waiver rights.

Furthermore, it is evident that both Chief Judge Motley's temporary restraining order and our October 1982 opinion were to encompass only members of the BDMP group. When the plaintiffs originally brought this action, they were not aware of the existence of the non-BDMP group; their complaint and amended complaint were filed specifically on behalf of those who received the "For Your Convenience" form.

In view of the differences between the BDMP and non-BDMP groups and of the limited nature of the class when the temporary restraining order and preliminary injunction opinion were filed, we decline at this time to extend the class to include non-BDMPs.

Legality of Cross-Program Recovery

Section 207(a), 42 U.S.C. § 407(a), specifically bars the right of OASDI recipients to future benefit

payments from being transferred or assigned, and exempts such payments from legal process. The statute reads:

> (a) The right of any person to any future payment [of OASDI] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Congress has carved out several exceptions to the prohibition of § 207(a) against transferring or assigning OASDI benefits. For instance, a beneficiary's rights to OASDI payments may be withheld by the Secretary of the SSA if the recipient has been overpaid OASDI moneys. 42 U.S.C. § 404(a). In parallel fashion, Congress has authorized the Secretary to reduce SSI payments when a beneficiary receives an SSI overpayment. 42 U.S.C. § 1383(b)(1). However, Congress has never provided for a reduction in future OASDI benefits in order to compensate for SSI overpayments.[3]

Nevertheless, the Secretary interpreted § 207(a) to prohibit only involuntary transfers or assignments

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[3] In *McDaniels v. Heckler*, 571 F.Supp. 880 (D.Md. 1983), a case with facts identical to the instant case, the court found that since OASDI overpayments may be taken out of OASDI benefit monies and since the same is true for SSI overpayments, a reading of section 207(a) which does not permit voluntary cross-program recovery is too narrow. The court cited the applicable sections of the Social Security Act and the Secretary's regulations, but cited no other authority to support its holding. As will be seen below, we respectfully disagree.

of OASDI benefits, 20 C.F.R. § 416.570, and the SSA devised procedures to recoup SSI overpayments from OASDI recipients who consented. *See Ellender v. Schweiker, supra,* at 1352-53. Thus, according to the interpretation of the SSA, an OASDI recipient may voluntarily agree to allow the Secretary to withhold part of his or her monthly benefit in order to repay an overpayment.

The Secretary is empowered to adopt regulations, pursuant to statutory provisions, which implement congressional will. *Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1936). In certain sections of the Social Security Act, Congress specifically gave the Secretary the power to prescribe standards by which the Act is to be administered. *See, e.g.,* § 1902(a)(17)(B), 42 U.S.C. § 1396a(a)(17)(B) (Medicaid). These standards have been given "legislative effect." *Schweiker v. Gray Panthers,* 453 U.S. 34, 43-44, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981) (Medicaid benefits); *Batterton v. Francis,* 432 U.S. 416, 425-26, 97 S.Ct. 2399, 2405-06, 53 L.Ed.2d 448 (1977) (Aid to Families with Dependent Children—Unemployed Fathers program). Although Title II, under which the instant action falls, authorizes the Secretary to establish regulations appropriate to carrying out the Federal Old-Age, Survivors and Disability Benefits statute, 42 U.S.C. § 405(a), it does not prescribe standards prerequisite to the statute becoming effective. *See Batterton v. Francis,* 432 U.S. 416, 424-25, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977) (Congress delegated less power to the SSA Secretary in Title II than it did in Title VI). Since the Secretary's interpretative regulations under Title II may be promulgated only

to further the statute and are not entitled to legislative deference, if they "operate to create a rule out of harmany with the statute [the regulations are] a mere nullity." *Manahattan General Equipment Co. v. Commissioner of Internal Revenue*, *supra*, 297 U.S. at 134, 56 S.Ct., at 399.

The question thus becomes whether voluntary, as well as involuntary, "transfers or assignments" are included within the meaning of § 207(a) as the Secretary contends and as the collection procedures the SSA has implemented assume.

The meaning of a statute may be discerned by a review of its language, intent, and legislative history. *See Watt v. Alaska*, 451 U.S. 259, 265-66, 101 S.Ct. 1673, 1677-78, 68 L.Ed.2d 80 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979); *Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 800 n. 20, 58 L.Ed.2d 808 (1979).

"The starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, *supra*, 451 U.S. at 265, 101 S.Ct. at 1677 (*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring)). The literal words used in § 207(a) are clear and unambiguous: "[t]he right of any person to any future payment [of OASDI] shall not be transferable or assignable [or] . . . subject to . . . other legal process." Regarding this section, the Supreme Court has stated that "section 407 . . . imposes a broad bar against the use of any legal process to reach all social security benefits." *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1973). We find a federal court that has addressed

the question of whether section 207(a) includes transfers by operation of law as well as voluntary transfers and found, after quoting the section's language, in the affirmative. *Beers v. Federal Security Administrator*, 80 F.Supp. 183, 185 (D.Conn.1948), *aff'd*, 172 F.2d 34 (2d Cir.1949).[4] In sum, the statory language appears clear on its face; it fails to evince any indication that "transfer or assignment" means involuntary, not voluntary, transfers or assignments.

The second factor which must be considered in construing a statute is its intent. *See Watt v. Alaska*, 451 U.S. 259, 265-66, 101 S.Ct. 1673, 1677-78, 68 L.Ed.2d 80 (1981). OASDI was created to provide for the care and maintenance of the elderly, survivors, and the disabled. *See, e.g., Department of Health v. Davis*, 616 F.2d 828, 831 (5th Cir.1980). Section 207(a) was promulgated to protect social security benefits from the reach of creditors. *Neavear*

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[4] The question whether the language of section 207(a) encompassed voluntary as well as involuntary transfers was hinted at recently in *Tidwell v. Schweiker*, 677 F.2d 560, 567 (7th Cir. 1982). *Tidwell* involved the seizure by state mental institutions of patients' OASDI benefits after a patient or the patient's representative signed a form of consent. The court found that the form constituted a transfer or assignment in violation of section 207 since it failed to advise patients that they would receive payment whether or not they signed, that it was revocable, and that the benefits covered were not subject to legal process. *Id.* at 568. The court did not directly reach the issue of whether the language of section 207(a) included voluntary as well as involuntary transfers or assignments. Thus, its statement that unless the flaws in the form are corrected "it canot be said that [the form] is voluntary or that the patient retains enough control to remove the agreement from the ambit of section 407," *id.*, presents an observation with which we respectfully disagree.

v. Schweiker, 674 F.2d 1201, 1205-06 (7th Cir.1982); *Department of Health v. Davis, supra*, at 831. The Supreme Court has held that when the state is "performing its statutory duty to take care of the needy, [it is not] in a preferred position as compared with any other creditor." *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 416, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1973). See also *Neavear v. Schweiker, supra*, at 1205 (Social Security Administrator does not have rights other creditors lack). Permitting OASDI recipients to voluntarily transfer their benefits, which are for many recipients their sole and very limited source of income, to the Government creditor is not in the spirit of protection and care mandated by the statutory framework.

Legislative history provides the third source of interpretation of statutes. *See Blum v. Bacon*, 457 U.S. 132, 142, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982) (deference given to conclusion of Secretary of SSA where it is strongly supported by legislative history); *Neavear v. Schweiker, supra*, at 1205 (interpretation of Secretary of SSA of section 207(a) fails when it is not supported by any legislative history, policy reasons or surrounding text). The legislative history of the Social Security Act, enacted originally in 1935 and amended in 1939, fails to discuss section 207(a). However, section 207(b),[5] enacted on April 20, 1983 in order to restrict modifica-

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[5] Section 207(b) of the Social Security Act, 42 U.S.C. § 407(b) provides:

> (b) No other provision of law, enacted before, on, or after the date of this section, may be construed to limit, supercede or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

tion of section 207(a), is briefly elaborated upon in legislative history which reveals that, after the passage of the Bankruptcy Reform Act of 1978, hundreds of cases considered social security and SSI benefits of debtors to be income for purposes of a Chapter XIII bankruptcy. Section 207(b) was passed to prohibit assignment of these benefits "notwithstanding any other provisions of law." H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-33, *reprinted in* [1983] U.S. Code Cong. & Ad.News 143, 301-02.[6] Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in section 207(b) further compels us to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments.[7]

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[6] In *McDaris v. Svahn*, CV F 82-459 EDP (E.D. Cal. Feb. 4, 1983), a case factually similar to the instant case, the court made its finding that voluntary cross-program recovery is legal on the basis of two bankruptcy cases that permitted OASDI benefits to become part of Bankruptcy Chapter XIII estates with the beneficiaries' consent and on the basis of several SSA regulations. Since subsequent to *McDaris* Congress enacted section 207(b) which undercuts the *McDaris* decision, and since, as we stated above, the SSA regulations are not entitled to deference because they are not in harmony with the statute, our conclusion differs from that of the *McDaris* court.

[7] Plaintiffs additionally emphasize that when Congress enacted section 207(b), it declined to authorize cross-program recovery even though the Secretary specifically requested such a program in her 1983 budget proposals. Defendants counter that despite statements by several Congressmen illustrating that Congress was aware of the Secretary's program of voluntary cross-program recovery, the legislative body did not overrule it when section 207(b) was added to section 207(a). We do not undertake to decide which of the two inter-

In short, the SSA Secretary's interpretation of section 207(a), which permits voluntary but not involuntary transfers or assignments of OASDI benefits, is not entitled to legislative deference and is "out of harmony with the statute." *Manhattan General Equipment v. Commissioner of Internal Revenue, supra*, 297 U.S. at 134, 56 S.Ct. at 399. The plain language of the prohibition as well as the statute's intent and legislative history all point to an interpretation that does not permit cross-program recovery. Therefore, we believe that the Secretary's regulation is "a mere nullity," *id.* and the SSA has no authority to reduce payments to OASDI beneficiaries in order to recover SSI overpayments regardless of whether or not the reductions are made with the consent of beneficiaries.[8]

Due Process Requirements

We do not question the Government's legal right to collect back all legitimate overpayments of SSI benefits from recipients who are presently able to repay their debts after they obtain their full OASDI checks. An appropriate means of advising recipients of the overpayments is through notice forms which most emphatically must meet procedural due process requisites. We find that, to be constitutionally adequate, the notices the Secretary sends must ex-

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pretations is correct; it is enough for us that by enacting section 207(b), Congress decided to provide additional protection to the benefits received by OASDI recipients.

[8] Since we find that cross-program recovery is illegal, we need not decide plaintiffs' contention that the Secretary's regulation allowing for voluntary transfers or assignments of OASDI monies violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

plain to the beneficiaries: (1) The time periods during which overpayment of SSI benefits arose; (2) The amount of overpayment in each time period and in total; (3) The amount of any prior repayments; (4) The reason for overpayment; (5) That the recipient has a right to appeal and/or reconsideration; (6) That under specified conditions, the recipient may have the right to waive repayment; (7) That the law prohibits money received through OASDI to be withheld by the Secretary in order to repay SSI overpayments and that no legal process may attach to those benefits (i.e., that transfer or assignment of OASDI benefits, whether voluntary or involuntary, and legal processes taking those benefits, violate section 207(a), 42 U.S.C. § 407(a)); and (8) That the time period in which the Government should have collected the overpayments may have passed, but that if the recipient pays back any installment or writes a letter acknowledging the overpayment, the Government's right to collect may be revived (i.e., the statute of limitations may have run, but partial repayment or a written acknowledgement may revive the claim).

The notice of overpayment sent out by the Secretary to more than 22,000 class members merely stated the amount of overpayment, asked for a refund, and suggested, "for [the recipient's] convenience," the balance of the overpayment could be withheld from OASDI payments. Some class members additionally received a prior notice informing them of their rights to appeal and waiver. After we issued our October 26, 1982 opinion, the Secretary, in the Government's Proposed Order Granting a Preliminary Injunction, Class Certification, and Intervention, advised sending notices to the plaintiff class notifying them of their

right to appeal and the conditions under which they could waive the repayments.

Due process prevents federal action that causes a deprivation of a protected liberty or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976).[9] Thus, when there is a threat that an individual's property will be taken, procedural due process requires that he or she receive "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

There can be no doubt that a notice which merely advises OASDI recipients of the fact and amount of alleged SSI overpayments offers the aggrieved plaintiffs no tangible information for them to dispute. If they do not know when the alleged overpayments occurred, the amount of overpayment in each time period, the amount of prior repayments, and the reason for the overpayment, it is impossible for them to check and compare their own records to determine whether or not they are in accord with the claims asserted in the notice. The consequence of such inadequate notice is that the Secretary's determinations remain final and unchallenged; the elderly beneficiaries have no evidence on which to object. "Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a con-

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[9] A person's interest in social security benefits has been deemed by the Supreme Court to be protectable property under the fifth amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

stitutional process. Without notice of the specific reasons . . . a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument . . . at the risk of missing the critical one altogether." *Gray Panthers v. Schweiker*, 652 F.2d 146, 168-69 (D.C. Cir. 1980). *See also Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975) (where reduction of public assistance to the aged, blind, and disabled citizens in Illinois was threatened, the court stated that "[n]otice cannot be adequate if it does not include the reasons or grounds for the action."); *Escalera v. New York Housing Authority*, 425 F.2d 853, 862 (2d Cir.), *cert. denied*, 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed.2d 91 (1970) (in a hearing for termination of public housing for tenants, due process requires that tenants be given notice of all items which may be considered against them so that they may effectively rebut the evidence.).

The notice requirements are particularly compelling in light of the population to whom the forms are being sent. The court in *Gray Panthers v. Schweiker*, *supra*, at 169, noted Congress' recognition "that the elderly, as a group, are less able than the general populace to deal effectively with legal notices. . . ." Without forms which paint distinctly the complete picture of the alleged overpayments to the plaintiffs, these elderly OASDI recipients have virtually no fighting chance to object to the Secretary's claims. It is therefore clear to us that notices which do not state the time periods of the SSI overpayments, the amount of overpayment in each period, any prior repayments, and the reason for the overpayment do not satisfy procedural due process requirements.

Our conclusion is bolstered by Supreme Court definitions of due process. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), the Court set forth a three part balancing test requiring consideration of: (1) the private interest affected by government action, (2) the risk of error in the procedure employed which results in depriving the individual of his or her interest and any probable value of different procedural safeguards, and (3) the Government's interest, including the function involved and fiscal and administrative burdens. *See also Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 1017-18, 25 L.Ed.2d 287 (1970) ("consideration of what procedures due process may require . . . must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.") (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)).

The first factor of the balancing test concerns the effect of government action on private interests. In *Mathews*, *supra*, disability benefits were terminated before an evidentiary hearing was held. The Supreme Court found that the worker receiving disability benefits could also receive income or other support. Thus, the termination of benefits before a hearing but after a thorough investigation did not result in substantial deprivation to the worker, especially when it was very likely that he could find employment to make up for the temporary loss. *Id.* 424 U.S. at 340-41, 96 S.Ct. at 905-06. The Court distinguished the worker's situation from the welfare-assisted plaintiffs in *Goldberg v. Kelly*, *supra*, who would have been

deprived of their very subsistence if their benefits had been terminated before eligibility hearings were held. *Mathews, supra,* at 340-41, 96 S.Ct. at 905-06.

We believe that the OASDI recipients in the instant case are more similarly situated to the plaintiffs in *Goldberg* than to the plaintiff in *Mathews.* Although it is true that eligibility for OASDI is not based on financial need and that recipients may have other sources of income, all of the class members, just a few short years ago, received SSI payments because they fell below a minimal poverty level. Furthermore, the financial situation of the named class members support our supposition that the great majority of class members live barely above the subsistence level. Notices which merely inform these recipients of money owing to the Government, resulting in payment by some beneficiaries who do not understand or are frightened by bureaucratic procedures, deprive those recipients of the only money they have to live on. The effects of government action on private individuals in this case are most severe.

The second factor in the *Mathews* balancing test is the risk of error in the procedures used to deprive the plaintiff of his or her property interest and the probable value of different procedural protections. *Mathews, supra,* at 335, 95 S.Ct. at 903. In *Mathews,* before disability benefits were terminated, the SSA gathered medical information from treating physicians and recipients and informed the recipient of its assessment and the reason therefor so that he or she could submit new arguments. The risk of erroneous determinations in these circumstances, the Court concluded, was minimal. *Mathews, supra,* at 343-47, 96 S.Ct. at 907-08. The procedures at issue in *Mathews* were contrasted by the Court with those in *Goldberg,*

supra. In *Goldberg* the procedure for welfare recipients to challenge termination of their benefits was only by way of written submissions, which the Supreme Court found did not effectively express the recipient's poor position. *Id.* 397 U.S. at 269, 90 S.Ct. at 1021. Likewise, the notice sent to Medicare claimants in *Gray Panthers*, *supra*, which did not inform them of reasons for denial of benefits, was found by the District of Columbia Circuit Court of Appeals to be so inadequate that no well-reasoned argument could be presented in opposition. The Court found a high risk of error resulting in deprivation of benefits to the elderly which violated procedural due process. *Gray Panthers*, *supra*, at 168-69.

The notices received by Dorothy Ellender and the other class members, like those received in *Gray Panthers*, were so vague that the plaintiffs did not have any evidence on which to base a challenge. The risk of error in the Secretary's procedure undoubtedly was substantial.

The third part of the balancing test concerns the Government's interest. *Mathews*, *supra*, 424 U.S. at 335, 96 S.Ct. at 903. In *Mathews*, the Government was requested to expend a large sum of money as well as carry a heavy administrative burden by providing pretermination hearings in disability benefits cases. The Court found that the cost to the Government outweighed the benefit to the recipients. *Mathews*, *supra*, at 347-48, 96 S.Ct. at 908-09. In the instant case, however, the Government will not be forced to incur large expenses by merely increasing the amount of information contained in notices to the OASDI beneficiaries. In fact, providing more complete information benefits the Government as the representatives of the "public interest." *See id.* at 347, 96 S.Ct.

at 908. In *Goldberg, supra*, the Supreme Court stated:

> Moreover, important governmental interests are promoted by affording [welfare] recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty . . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . .

Id. 397 U.S. at 264-65, 90 S.Ct. at 1018-19.

We believe that it is similarly in the interests of the Government to refrain from providing vague notices to OASDI beneficiaries, most of whom barely live above the subsistence level, which merely inform them of debts owed to the Government but do not advise them of the time periods of the overpayments, the amount of overpayment in each time period,[10] any

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[10] As the plaintiffs correctly note, the Secretary's own regulations require that notices of overpayment include the amount of such overpayment in each time period:

> (a) *Notice of overpayment and underpayment determination.* Whenever a determination concerning the amounts paid and payable for any period is made and it is found that, with respect to any month in the period, more or less than the correct amount was paid, written notice of the correct and incorrect amounts for each such month in the period will be sent to the individual against whom adjustment or recovery of the overpayment . . . may be effected. . . .

20 C.F.R. § 416.570.

prior repayments, and the reason for overpayment. The omission of these elements vital to beneficiaries who wish to object to the overpayment constitute a denial of due process under the fifth and fourteenth amendments.

The plaintiffs also contend that, as a matter of procedural due process, they must be notified of their rights to waiver and to appeal. First, we note that those members of the class who received the "Notice of Overpayment—Refund Requested" form prior to the "For Your Convenience" form have already been informed of these rights. Second, we reiterate that in the Government's Proposed Order Granting a Preliminary Injunction, Class Certification and Intervention, the Government's suggested notice included information about these rights. The parties thus seem to be in accord about the necessity of providing information, clearly set forth in the notices, on waiver and appeal rights.

We nevertheless find it essential to stress the constitutional significance of stating in comprehensible terms to OASDI recipients their waiver and appeal rights. Without notice of those fundamental entitlements, plaintiffs would be denied all opportunity to present thier objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Furthermore, the *Mathews v. Eldridge* balancing test applied to the exclusion of these rights would no doubt tilt favorably toward the plaintiffs: Notices lacking information regarding waiver and appeal rights, resulting in payment by at least some plaintiffs who could not afford the expenditure, would deprive those beneficiaries of their means of survival; the risk of error from these omissions was substantial since plaintiffs would not

even preliminarily know they had rights to oppose the Secretary's determination and would therefore not argue about the overpayment; and the Government's expense in providing notice of these rights, and consequently, of the forums for the expression of objections, is incomparably minimal next to the cost of repayments of money that may not be owing by individuals who struggle to make ends meet. In short, as the Government recognizes, notice of waiver and appeal rights before money is paid back to the Government by those who once allegedly received SSI overpayments are imperative requirements of due process.

Plaintiffs also contend that due process further demands that the notices of overpayment inform plaintiffs of two legal matters: first, that section 207(a) prohibits transfer or assignment of rights to any future OASDI benefits and bars the attachment of legal process to such benefits, and second, that the time period in which the Government should have collected the overpayment may have expired but that partial repayment or written acknowledgment of the debt may revive the expiration date.[11] We agree with plaintiffs that notices lacking this legal information are constitutionally deficient.

In setting forth the due process requirements of notice for the purpose of affording aggrieved parties the opportunity to present their objections, the Supreme Court stated that notice must be "reasonably

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[11] A six year statute of limitations applies to suits for recovery of overpayments under the Social Security Act. *See United States v. Gravette Manor Homes*, 642 F.2d 231 (8th Cir. 1981) (recovery of Medicare overpayments); *United States v. Dimeo*, 371 F.Supp. 95 (N.D.Ga. 1974) (recovery of social security benefits paid to representative payee).

calculated to convey the required information," and it must take into account "the practicalities and peculiarities of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 70 S.Ct. 652, 657-58, 94 L.Ed. 865 (1950). Since the elderly and generally poor plaintiffs in this case justifiably rely on the Government to properly fix their OASDI benefits, they cannot be expected to seek professional services to review the checks and statements received each month. As a practical matter, the class members have no way of being apprised of their legal rights—in fact, would not even know that their legal rights were implicated—except through the notices they receive from the Government. Thus, if the Government fails to inform the plaintiffs of the prohibitions of section 207(a) and the statute of limitations defense, the plaintiffs will suffer from deprivation of their benefits.

Notices informing debtors of their legal rights as a due process requirement are not a new phenomenon in the law. Courts have required such information in communications from private creditors to debtors. *See Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir. 1980); *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178 (S.D.N.Y. 1982).

In *Finberg, supra*, plaintiff's creditor, a bank, sought to garnish plaintiff's checking and savings accounts, in which the total sum of money had been derived solely from social security retirement benefits. In discussing the notice informing the plaintiff of the attempt to garnish her property, the court found a violation of due process when the creditor failed to tell the plaintiff of the exemption under the federal and state laws for social security benefits. The court specifically noted the lack of knowledge of these laws

by most people and the inability of many debtors, particularly those with scarce funding sources, to contact lawyers before their property is garnished. *Id.* at 62.

In *Deary, supra,* our Court granted partial summary judgment to the class of plaintiffs whose income, including social security benefits, was garnished by banks without notice of exemptions (or procedures for asserting them) to which the class was entitled and without a prompt opportunity for a hearing. The court observed that notice which failed to advise plaintiffs of the law regarding exemptions could leave the plaintiffs "deprived of the use of the property despite the theoretical availability of relief." The Court concluded that such notice was unconstitutional. *Id.* at 1188.

We find that the importance of including legal information clearly and simply presented regarding the prohibitions of section 207(a) and the statute of limitations defense is at least as compelling in this case where the Government is the creditor as is the notice of the law required in *Finberg* and *Deary,* both of which involved private creditors. This conclusion is particularly compelling in light of the Supreme Court's recognition that a state is not in a preferred position compared to any other creditor when it is performing its duty to take care of the needy. *Philpott v. Essex County Welfare Board,* 409 U.S. 413, 416, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1978). Put another way, the risk of error inherent in notices which fail to inform social security recipients of the law, together with both the proportionately large deprivation of necessary monies that many beneficiaries would repay and the relatively low cost to the Government of informing plaintiffs of the law, *Mathews v. Eldridge,*

supra, 424 U.S. at 335, 96 S.Ct. at 903, weigh heavily in favor of including information in simple terms about section 207(a) and the statute of limitations in notices sent to the class members.[12]

Defendants distinguish the *Finberg* and *Deary* cases from the instant situation on the ground that in the former two cases garnishment was executed without voluntary agreement by the debtors whereas here, the plaintiffs must voluntary choose to repay through OASDI income. We find first that any repayment directly through OASDI withholdings, whether voluntary or involuntary, violates section 207(a), and second, that any decision to independently repay the Secretary, made without knowledge of legal defenses, is fictitious and therefore not a voluntary choice at all.

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[12] On this point we differ from the decisions of *McDaniels v. Heckler*, 571 F.Supp. 880 (D.Md. 1983); and *McDaris v. Svahn*, CV F 82-459 EDP (E.D.Cal., Feb. 4, 1983), both of which concerned facts identical to those in the instant case. In *McDaniels* and *McDaris*, the courts found that due process did not require notice to the plaintiffs of the statute of limitations. Citing no authority, the *McDaniels* court concluded that as long as the plaintiff is notified that the decision to pay back is voluntary, the plaintiff need not be informed of statute of limitations defenses. Also citing no authority, the *McDaris* court determined that it would be impractical and confusing to require the Government to inform recipients of all their legal defenses and that the administrative procedures provide for problems in recipients' files. We believe that the statute of limitations is a significant defense about which most non-lawyers would never imagine pleading, and it is thus distinguishable from a variety of other defenses. Furthermore, the members of the plaintiff class who received as a first notice the "For Your Convenience" form did not even know they had a right to appeal; the administrative procedures were not available to them.

The Secretary also cites cases which state that the statute of limitations is a personal affirmative defense which must be asserted by the party to whom it is available. *See, e.g., Kalmich v. Bruno*, 553 F.2d 549 (7th Cir.), *cert. denied*, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1970); *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir.1962). However, none of the cases the Secretary cites concern the special relationship of debtor and creditor, in which the probability of deprivation of property ranks high. We think the inclusion of the statute of limitations defense and the possibility that partial payment or written acknowledgement might revive the statute if it has run, is an essential mandate of procedural due process in the context of this case.

We conclude that the Secretary must send to all class members notices which advise them of the overpayment, the time period during which it occurred, the amount of overpayment in each time period, any prior repayments, and the reason for the overpayment, appeal and waiver rights,[13] and legal rights including the section 207(a) prohibitions and the statute of limitations. The notices must be written in language comprehensible to an average layperson; they must be "reasonably calculated to convey the re-

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[13] Although some class members received notices informing them of their appeal and waiver rights prior to receiving the "For Your Convenience" notice, the defendant does not seem to be able to identify specifically who did and who did not receive the first notice. It is generally true that due process does not require a procedure done constitutionally to be repeated, *see Goldberg v. Kelly*, 397 U.S. 254, 267 n. 14, 90 S.Ct. 1011, 1020 n. 14, 25 L.Ed.2d 287 (1970), but an exception may be made when some people will be denied due process altogether if others do not receive two notices.

quired information." *Mathews v. Eldridge*, *supra* 424 U.S. at 335, 96 S.Ct. at 903.

Retroactive Relief

We turn finally to plaintiffs' request seeking the return of OASDI benefits withheld by the Secretary as well as monies paid as a result of the Government's unconstitutional notices. We find that mandamus jurisdiction, on which this case is predicated, does not confer on the district courts the authority to award relief and that the remedy of retroactive payments is not appropriate in the circumstances of this case.

Our Court of Appeals has repeatedly held that mandamus jurisdiction lies to assert claims which are essentially procedural in nature. See *Dietsch v. Schweiker*, 700 F.2d 865, 868 (2d Cir.1983); *Ellis v. Blum*, 643 F.2d 68, 82 (2d Cir.1981); *White v. Mathews*, 559 F.2d 852, 856 (2d Cir.), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1981). We entertain no doubt that the determination of both the legality of cross-program recovery, as a means for the SSA Secretary to recoup overpayments, and the constitutionality of the notice sent to the OASDI recipients are procedural questions. However, the issue of whether or not plaintiffs are entitled to benefits is substantive in nature, one which Congress left to the Social Security administrative process to address,[14] not to district courts hearing claims under

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[14] Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), confers on the district courts jurisdiction over establishment of benefits cases in which the Secretary has issued a final decision. We decline to find that section 205(g) is the basis of jurisdiction in this case since many members of the plaintiff class who admittedly received a notice, prior

mandamus jurisdiction. *See Dietsch v. Schweiker*, *supra*, at 868; *Ellis v. Blum*, *supra*, at 82; *White v. Mathews*, *supra*, at 856. Accordingly, we have no jurisdiction to grant plaintiffs' request for retroactive benefits.

Moreover, even if we did have jurisdiction over the retroactive benefits claim, such a remedy would be entirely inappropriate in the instant case. In *Chevron Oil v. Hudson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court set forth the seminal test of nonretroactivity:

> In our cases dealing with the nonretroactivity question , we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, *supra*, 392 U.S. [481], at 496, 88 S.Ct. [2224], at 2233 [20 L.Ed.2d 1231], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen v. State Board of Elections*, *supra*, 393 U.S. [544], at 572, 89 S.Ct. [817], at 835 [22 L.Ed.2d 1]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, *supra*, 381 U.S.

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to the "For Your Convenience" letter, informing them of their right to appeal failed to do so. Consequently, those members did not exhaust their administrative remedies, which they were required to do in order to receive any benefit payments and before seeking a district court determination.

> [618], at 629, 85 S.Ct. [1731], at 1738 [14 L.Ed. 2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, *supra*, 395 U.S. [701], at 706, 89 S.Ct. [1897], at 1900 [23 L.Ed.2d 647].

404 U.S. at 106-107, 92 S.Ct. at 355.

An application of the *Chevron Oil* test to the instant case advises us that the awarding of retroactive relief is inappropriate.

The first prong of the *Chevron Oil* test requires that a new legal concept be established by the decision to be applied nonretroactively. Our opinion is deciding for the first time both that cross-program recovery, whether voluntary or involuntary, is illegal and that the Secretary's notices violated due process. Nonretroactivity is applicable in these circumstances. *See Chevron Oil v. Hudson*, *supra*, at 107, 92 S.Ct. at 355; *Jimenez v. Weinberger*, 523 F.2d 689, 703-04 (7th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1975); *Novak v. Harris*, 504 F.Supp. 101, 104 (E.D.N.Y.1980).

The second requirement of nonretroactivity focuses on whether retrospective operation will enhance or deter the history, purpose and effect of the rule at issue. As discussed at length above, the purpose of section 207(a) is to protect beneficiaries from creditors' claims. Those recipients who repaid benefits after receiving the notices were deprived of that protection and forced to consume other assets in their

struggle to maintain their compelled standard of living. See *Jimenez v. Weinberger*, 523 F.2d 689, 703 (7th Cir. 1975) (second factor of *Chevron* test weighed in favor of illegitimate children of disabled insured who were born after the disability's onset and who were denied disability benefits); *Novak v. Harris*, 504 F. Supp. 101, 105 (E.D.N.Y. 1980) (second factor weighed in favor of plaintiff who was denied retroactive payment of social security widower's benefits). It is also true, however, that as time wears on and the hardships of repayment wears off, retroactive payments serve compensatory, not remedial, functions. *See Rivers by Rivers v. Schweiker*, 692 F.2d 871, 873-74 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1783, 76 L.Ed.2d 353 (1983); *Rothstein v. Wyman*, 467 F.2d 226, 234-35 (2d Cir. 1972), *cert. denied*, 441 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973). In the case at hand, at least one and a quarter years have passed since those plaintiffs who withheld benefits last repaid the Secretary. Present payments by the Government of retroactive benefits would do nothing to enhance the protection of beneficiaries from creditors claims, nor would such current payments restore past needs. Our analysis of the second *Chevron Oil* factor leads us to conclude that nonretroactivity is appropriate.

Similarly, the third and last element of the *Chevron Oil* test, which requires a balancing of the equities of retroactive application, yields a determination in favor of nonretroactivity. Had the named plaintiff not been joined by a class, the overall cost to the Government of retroactive payment would be insubstantial. See *Novak v. Harris*, 504 F. Supp. 101, 106 (E.D.N.Y. 1980). However, a multiplication of that minimal amount by the thousands of beneficiaries who

repaid some part of the SSI overpayments results in an expensive and undue burden on the Government. Furthermore, the repayment of benefits by the Government would entail the development of procedures designed for that purpose, equipped with new notices, new training of staff, and other operations, all of which would cause the already high cost to skyrocket. We find that the equities tip in favor of the Government on the third part of the Supreme Court's non-retroactivity test.

In sum, retroactive payments are an inappropriate form of relief in this motion for partial summary judgment. Our Court has no jurisdiction to hear a claim for such payments and, in any case, retroactivity is inapplicable under *Chevron Oil.*

III. *Conclusion*

Based on the facts and the law here presented, we are compelled to grant plaintiffs' motion for partial summary judgment with respect to members of the BDMP group only. We do so by virtue of our determination reflected herein on the issues of the illegality of cross-program recovery and the unconstitutionality of the notices sent to the beneficiaries by the Government. We deny the motion addressed to the repayment by the Government of retroactive benefits.

SO ORDERED.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82-4816

ELLENDER, DOROTHY, ZAMSKI, ANGELA, TROWBRIDGE, JAMES, BRUNJES, LOIS W., and SMITH, VERLEY, individually and on behalf of all others similarly situated, PLAINTIFFS

v.

SCHWEIKER, RICHARD S., Secretary of the Department of Health and Human Services, SVAHN, JOHN A., Commissioner of the Social Security Administration, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-22-82	1	Fld. Order granting leave to proceed in forma pauperis. Sweet, J.
7-22-82	2	Fld. cmpl., issued summons & not. pur. 28 USC 636.
8-16-82	3	Filed SUMMONS WITH Affdvt. of Service by Ann Moynihan on 8-13-82 served a copy of summons & complt. upon R. Schweiker Sec. of the Dept. of HHS Certified mail #P309892660, J. Svahn, Comm. of the Soc. Security Admin. #P309892666 and Attny. Gen. of the US Wash. D.C. #P309892658

DATE	NR.	PROCEEDINGS
8-16-82	4	Filed ORDER TO SHOW CAUSE for a Temporary Restraining Order, Class Certification pur. to Rule 23(a) and (b)(2) or alternatively (b)(1)(A), & Preliminary Injunction pur. to 28 U.S.C. § 2202 & Rule 65 FRCP. Ret: 9-13-82 at 2:00 p.m. room 906. Motley, J. sent to chambers
8-24-82	5	Filed pltffs' First Request for Production of Documents & Interrogatories.
9-10-82	6	Filed MEMORANDUM OF LAW in opposition to pltffs' motion for a Prel. Inj. & for class certification & in support of defts' Motion to dismiss Pltffs' Claims for Monetary relief. for defts.
9-10-82	7	Filed AFFDVT. of Harris G. Factor for USA.
9-10-82	8	Filed AFFDVT. of Valerie Ryan for USA.
9-15-82	9	Filed ORDER TO SHOW CAUSE for Intervention & for a Class Certification & a Prel. Inj. why an order should not be made, granting, pur. to Rule 24(b(2) FRCP PERMISSION FOR Rose Cinque, Joyce Koslin & Jennie Koslin to intervene as a pltff in this action. Granting CLASS Certification pur. to Rule 23 FRCP etc. Ret: 9-17-82 at 12:30 p.m. Cooper, J.
9-15-82	10	Filed MEMORANDUM OF LAW in support of motion for intervention, Class certification & Prel. Inj.
9-16-82	11	Filed pltffs' REPLY MEMORANDUM OF LAW in support of Prel. Inj. & Class Certification.
9-22-82	12	Filed AFFDVT. of Beatrice Disman for defts.
9-23-82	13	Filed SUPPLEMENTARY Declaration & Affdvts. in support of Prel. Inj. for pltffs' by Toby Golick.

DATE	NR.	PROCEEDINGS
9-29-82	14	Filed AFFIRMATION in opposition to motion to dismiss by toby [*sic*] Golick for pltffs.
9-30-82	15	Filed USA's NOTICE OF MOTION pur. to Rule 12(b)(1) and 12(b)(6) FRCP dismissing the complt. Ret: 10-7-82
9-30-82	16	Filed MEMORANDUM OF LAW in opposition to pltffs' Motion for a Prel. Inj. & for Class Certification & in support of defts' Motion to dismiss pltffs' Claims for Monetary Relief.
10-7-82	17	Filed First AMENDED COMPLT. CLASS ACTION Issued Ammended [*sic*] summons.
10-25-82	18	Filed AMENDED SUMMONS with certificate of service by Ann Moynihan on 10-7-82 served a copy of the amended summons & first Amended Complt. on Richard S. Schweiker; John A. Svahn; Attny Gen of the U.S. Wash. D.C. & USA for the SDNY
10-27-82	19	Filed OPINION #53860 "CLASS GRANTED", On the facts here presented & the law applicable thereto we are compelled to, & do, grant the applications for a prel. inj. intervention & cLASS [*sic*] CERTIFICATION. Settle Order on three days notice Cooper, J. m/n
11-4-82	20	Filed stip and order ext. time for defts to answer the Amended Complt. to 11-22-82. So ordered Cooper, J.
11-4-82	21	Filed AMENDED SUMMONS within 60 days after service of this summons exclusive of the day of service, upon you Richard S. Schweiker & John A. Svahn, serve upon John E. Kirklin, Esq. etc.—Clerk.
11-9-82	22	Filed USA's NOTICE OF MOTION for an Order granting reargument of defts' motion to dismiss for lack of subject matter Ret: 11-21-82.

DATE	NR.	PROCEEDINGS
11-9-82	23	Filed MEMORANDUM OF LAW in support of defts' Motion for reargument with respect to pltffs' claims for Damages Arising out of Alleged Constitutional Violation
11-17-82	24	Filed pltffs' MEMORANDUM OF LAW in opposition to defts' Motion to Reargue with respect to pltffs' Claim for Damages. (The Elderly)
12-08-82	25	Filed Deft. Schwieker's ANSWER. USATT
12-7-82	—	TRIAL CONFERENCE HELD BY Cooper, J
1-10-83	26	Filed transcript of amend of proceedings dated 9-17-82
1-27-83	27	Filed Transcript of proceedings dtd 8-12-83.
2-9-83	—	Hearing Held . . . .
3-8-83	28	Filed summons with Affidavit of service of amended complaint. Richard S. Schweiker (cert) 281-010-546 3-7-83 John A. Svahn 281-010-547 3-7-83 Richard A. Schweiker M. Knidsen, American council of Life Ins/.2-24-83 Johna A. Svahan T Walker (SS Adm) 2-24-83
4-14-83	—	Filed memo-end on the back of document #22 . . . . By consent of counsel on both sides the within Motion is withdrawn inasmuchas the amended complaint renders it moot . . . so Ordered . . . Cooper, J. mn
7-1-83	29	Fld. Pltff's Notice of Settlement, that an order granting preliminary injunction, class certification & intervention of which the within is a true copy will be presented for settlement to the Hon. I.B. Cooper, on 7-8-83.

DATE	NR.	PROCEEDINGS
7-22-83	30	Fld. Pltff's Notice of Motion for Pretrial Summary Judgment, Ret; 9-9-83.
7-22-83	31	Fld. Pltff's Memorandum of law in support of motion for partial summary judgment.
7-27-83	32	Fld. Pltff's Notice of Motion for Intervention, permitting Jessie Savage to intervene in this action, Ret; 8-5-83.
7-27-83	33	Fld. Pltff's Memorandum of Law in support of Motion to intervene.
8-9-83	34	Fld. Deft's Affdvt of Harris G. Factor.
8-19-83	35	Fld. Pltff's Memorandum in opposition to proposed counter-order.
8-23-83	36	Fld. Deft's Reply Memorandum in support of Proposed Counter-Order.
8-24-83	37	Fld. Stip & Order that the return dtd of pltff's motion to permit Jessie Savage to intervene in this action be and it is hereby adjourned from Aug. 5, 1983 to Aug. 19, 1983. So Ordered . . . Cooper, J.
9-13-83	38	Fld. Deft's Counter-Statement purs to rule 3(g) & Notice of Motion for summary judgment dismissing the complaint, Ret; 9-16-83.
9-13-83	39	Fld. Deft's Memorandum of law in opposition to pltff's motion for partial summary judgment and in support of deft's motion for summary judgment dismissing the complaint.
10-24-83	40	Fld. Pltff's Declaration in support of pltff's motion for partial summary judgment and in opposition to deft's motion to dismiss. (Received in night deposit box on 10-21-83).
10-24-83	41	Fld. Pltff's Reply Memorandum of law in support of partial summary judgment and in opposition to deft's motion to dismiss. (Received in night deposit box on 10-21-83).

DATE	NR.	PROCEEDINGS
11-4-83	42	Fld. Deft's Reply Memorandum of law in opposition to pltff's motion for partial summary judgment and in support of deft's motion for summary judgment dismissing the complaint.
11-7-83	43	Fld. Deft's Affdvt of Patricia Tartarilla.
11-17-83	44	Filed OPINION #55420, Based on the facts & the law here presented, we are compelled to grant pltffs' motion for partial summary judgt. with respect to members of the BDMP group only. etc. We deny the motion addressed to the repayment by the Gov't. of retroactive benefits. So ordered Cooper, J., m/n
12-20-83	45	Fld. Pltff's Declaration & Notice of Motion for an order awarding reasonable atty's fees & costs purs. to 28; U.S.C. $2412, Ret; 1-3-84. (Received in the night deposit box on 12-19-83.)
12-20-83	46	Fld. Pltff's memorandum of law in support of motion for reasonable atty's fees & costs. (Received in the night deposit box on 12-19-83).
1-9-84	47	Filed stip and order that the motion for an award of attnys. fees & costs be adj. to 2-17-84. So ordered Cooper, J.
2-22-84	48	Filed MEMORANDUM OF LAW in opposition to pltff's Motion for attnys' Fees & Costs.
2-28-84	49	Filed stip and order that defts may serve & file papers in opposition to pltffs' motion for an award of attnys. fees & costs on or before 2-21-84 & pltffs. may serve & file a reply on 3-6-84. So ordered Cooper, J.
3-7-84	50	Filed REPLY MEMORANDUM OF LAW in support of pltffs' Motion for reasonable attnys. fees.

DATE	NR.	PROCEEDINGS
4-12-84	51	Filed OPINION #55972; We direct the parties to attempt to resolve the amt of att and costs to be paid to the pltffs in accordance with the guidelines set forth hereinabove, and do so within 60 days of the filing of this Order—provided, if counsel arrive at a final agreement it will be subject to our approval . . . So Ordered Cooper J.
7-20-84	52	Filed STIP AND ORDER, that the total amt. of costs & attnys' fees payable to pltffs. under the Court's April 10, 1984 Opinion is $40,734.30 etc. as so indicated. So ordered Cooper, J.
12-19-84	53	Filed stip and order of discontinuance of Damage Claims & the named pltffs' & named intervenor-pltffs' individual damage claims against the defts are discontinued & dismissed. So ordered Cooper, J.
1-3-85	54	Filed JUDGMENT #85,0008 . . . . It is Adjudged that the pltffs' counsel do have & recover of the defts. the sum of $40,734.30. Cooper, J. m/c
3-29-85	55	Fld. deft's Declaration and Notice of Motion for an order vacating judgment filed 3-3-85. RET: 4-11-85
3-29-85	56	Fld. Deft's Memorandum of Law in Support of #55
4-10-85	57	Filed stip and order adj. defts' Motion for an order vacating the judgt. filed on 1-3-85 is adj. to 4-18-85. So ordered Cooper, J.
4-22-85	58	Filed stip and order that defts motion, presently returnable on 4-18-85 is adj. to 4-25-85. So ordered Cooper, J.
4-22-85	59	Filed DECLARATION in opposition to Motion to vacate Judgment by Toby Golick for pltffs.

DATE	NR.	PROCEEDINGS
4-22-85	60	Filed Memorandum OF LAW in opposition to defts' Motion to vacate the judgt. of 1-3-85 for pltffs.
5-15-85	61	Filed defts' SUPPLEMENTAL MEMORANDUM OF LAW in support of their Motion to Vacate the Judgt. filed in this action on 1-3-85.
5-24-85	62	Filed pltffs' MEMORANDUM OF LAW in opposition to defts' SUPPLEMENTAL MEMORANDUM dated 5-15-85.
7-19-85	63	Filed MEMORANDUM, In short, we find that pltffs timely petitioned for attnys' fees; consequently we decline to vacate the judgt. on the ground of lack of subject matter judisdiction. Defts' motion to vacate the judgt for attnys' fees filed on 1-3-85 is denied in all respectes. So ordered Cooper, J. c/m/c.
9-17-85	64	Filed Defts' NOTICE OF APPEAL from Opinion filed on 11-17-83 & from final judgt. & memorandum decision on 7-19-85. Mailed copy of Toby Galick [*sic*] Esq. Legal Services for the elderly 132 W. 43rd St. N.Y.C. 10036
9-18-85	—	Forwarded copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & docket entries to Court of Appeals.
10-1-85	65	Filed pltff Appellants NOTICE OF PROTECTIVE CROSS-APPEAL from the order filed 11-17-83. Mailed copy to Steven E. Obus Asst. USA One St. Andrew's Plaza N.Y.C. 10007
10-2-85	—	Forwarded copy of Notice of Protective Cross appeal to Dist. Judge & copy of Notice of appeal & docket entries to Court of Appeals.
10-4-85	66	Filed pltff's Notice of Change of Counsels' Office Affiliations & Addresses.

DATE	NR.	PROCEEDINGS
10-8-85	67	Filed ORDER, We decline to enter the proposed final judgt. submitted by deft. Our order filed 11-17-83 permanently enjoining defts' challenged practices was by law immediately appealable 22 months ago. etc. We make the same comment with respect to the stip filed on 12-19-84 dismissing pltffs' outstanding claims for damages, deft. was offered no justification or excuse for its failure to proceed. So ordered Cooper, J. c/m/c
11-6-85	68	Filed Notice of Original Record on appeal to the USCA for the Second Circuit.
11-7-85	69	Filed defts' NOTICE OF APPEAL from the order filed on 10-8-85. Mailed to Toby Golick, Esq. 55 Fifth Ave. N.Y.C. 10003
11-7-85	—	Forward copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & docket entries to Court of Appeals
12-11-85	70	Filed NOTICE that the 1st Supplemental Record on appeal has been certified and transmitted to the USCA 2nd Circuit on 12/11/85.
1-17-86	71	Filed TRUE COPY OF USCA Mandate, Ordered that said petition be & is Denied See Opinion filed today in #85-6274 . . . . copy sent to chambers.
3-5-86	72	Filed true copy of USCA Stipulation, that portion of the appeal that sought review of the Dist. Court's Memorandum decision of 7-15-85 & 7-17-85, are dismissed with prejudice & without costs . . . . copy sent to chambers.
3-5-86	73	Filed true copy of USCA Stipulation that the cross-appeal is withdrawn without prejudice to reinstatement on 30 days written notice etc. . . . . copy sent to chambers.
5-30-86	74	Filed true copy of USCA MANDATE, The present appeal is dismissed as moot . . . . EOD

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No. 86-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

—v.—

DOROTHY ELLENDER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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56 pp

QUESTIONS PRESENTED

(1) Is a certiorari petition timely when:

(a) the question presented in the petition--whether a final judgment was entered in the district court--was fully litigated on a prior appeal to the court of appeals which affirmatively decided this question in an opinion dismissing the appeal as time-barred, and (b) the court of appeals also denied a petition for a writ of mandamus to compel the district court to enter a new judgment, and (c) no timely petition for certiorari was filed from these court of appeals decisions, and (d) the certiorari petition is filed from a subsequent decision of the court of appeals dismissing as moot a later appeal in the same case raising the identical question, and (e) the only question raised in the certiorari petition concerns the correct-

ness of the earlier court of appeals' decisions, from which no certiorari petition was filed?

(2) Where a judgment disposing of all the remaining issues in a case is set forth on a separate document, and its contents are duly summarized in the clerk's docket, and the court sends to the clerk a memorandum filed in the permanent court record stating that the accompanying judgment "closes the case," and the losing party abandons his remedies under Fed. R. Civ. P. 60(b) to revise the judgment, is the losing party's time to appeal nonetheless extended indefinitely because the judgment does not explicitly mention all relief previously ordered by the court?

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In the Supreme Court of the United States
October Term, 1986

No. 86-120

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

V.

DOROTHY ELLENDER, ET AL., RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO TO THE PETITION FOR CERTIORARI

Respondents respectfully submit this brief in opposition to the petition of the Secretary of Health and Human Services for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

COUNTERSTATEMENT OF THE CASE

The Secretary's selective statement of the case, purporting to simplify a convoluted procedural history, is misleading and does not disclose facts crucial to the proper disposition of this petition.

First, the Secretary mischaracterizes the decision below as a decision on the merits of whether the district court had entered a final judgment. In fact, the decision below does nothing more than dismiss the Secretary's appeal as moot because the issue presented (whether the judgment below had been improperly entered) was previously decided in a prior appeal in the same case. In that prior appeal, docketed as 85-6274, the court of appeals dismissed the Secretary's appeal on the merits as time-barred; the court rejected the Secretary's claim

that the time to appeal had not run because no proper judgment had been entered below. No timely certiorari petition was filed from the decision in 85-6274.

Second, the Secretary's certiorari petition does not disclose that the exact relief sought here--an order directing the district court to enter a new judgment--is identical to the relief sought and denied in a prior petition to the court of appeals for a writ of mandamus. The Secretary's certiorari petition does not even mention the mandamus petition. The mandamus petition, docketed as 85-3066, was referred to the same panel that heard 85-6274 (the appeal on the merits), and was denied simultaneously with the decision in 85-6274, dismissing the Secretary's appeal on the merits as untimely. The order denying the petition for the writ

of mandamus expressly referred to the opinion in 85-6274 holding that a final judgment had already been entered. The decisions in both 85-6274 and 85-3066 were issued before the decision below and the time to petition for certiorari from both decisions has long since expired.

Third, the Secretary misrepresents the position he took in the court of appeals in 85-6274 (the appeal on the merits) by stating that he had only "suggested" that the court entertain the appeal on the merits, and that he had conceded the appeal was premature (Pet. 7). In fact, the Secretary never suggested the appeal was premature: he filed a notice of appeal on the merits, and the sole issue briefed and argued when plaintiffs moved to dismiss the appeal was whether the appeal was too late.

In addition to failing to reveal facts crucial to determining the timeliness of this petition, the Secretary has omitted facts relevant to the court of appeal's holding in 85-6274 (the court of appeals' first decision dismissing the appeal on the merits) that a final judgment had been entered in this case and no timely appeal had been filed. Accordingly, respondents shall set forth a full factual statement.

1. This case is a class action challenging practices of the Social Security Administration ("SSA") under its 1982 Backlogged Debt Management Project. Under this project, SSA sought to recover alleged overpayments of Supplemental Security Income ("SSI")[1] benefits from former SSI recipients who had since

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[1]. The SSI program provides benefits to needy aged, blind and disabled persons. 42 U.S.C. 1381 et seq.

become recipients of Old Age Survivors, and Disability Insurance ("OASDI") benefits[2]. These SSI debts generally resulted from computer errors and dated back to the early 1970's when the SSI program was initiated. Because OASDI benefits enjoy complete immunity from transfer, assignment, garnishment or any other legal process pursuant to 42 U.S.C. 407[3], SSA sought an indirect method of

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[2]. The OASDI program provides Social Security benefits to retired or disabled wage earners and their dependents. It is financed by contributions from wage earners and their employers. 42 U.S.C.401 et seq.

[3]. 42 U.S.C. 407 provides: "(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. (b) No other provision of law, enacted before, on, or after the date of the enactment of this section may be construed to limit, supercede, or otherwise modify the provisions of this section except to the extent that it does so by express

collecting these debts by inducing beneficiaries to consent to "voluntary" reductions in current benefits.

2. Named plaintiff Dorothy Ellender[4], an elderly Social Security recipient, joined by several other similarly situated individuals, challenged defendant's practice of collecting alleged overpayments by sending coercive notices suggesting that recipients consent to having their Social Security benefits withheld or reduced. The plaintiffs claimed the Social Security Act did not permit the defendants to collect alleged overpayments received under the SSI

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reference to this section."

[4]. Dorothy Ellender was 74 years old when this case was filed. She is now 78 years old. Her sole source of income is her monthly Social Security (OASDI) widow's benefit check. In Mrs. Ellender's case, the Secretary sought to withhold Mrs. Ellender's widow's benefits in order to recover alleged overpayments of SSI made in 1974 and 1975.

program by reducing OASDI benefits. Plaintiffs also claimed that the notices sent them regarding the alleged debts were misleading and failed to advise recipients of their right to appeal the alleged overpayments, their right to have repayment waived under the provisions of 42 U.S.C. 1383(b)(1) [5], or of their protection against repayment under 42 U.S.C. 407 and the applicable statute of limitations.

3. On August 12, 1982, the district court granted plaintiffs' motion for a temporary restraining order prohibiting the Secretary from carrying out his challenged policies and practices. On October 26, 1982, the court granted plaintiffs' motions for a

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[5]. Repayment of an SSI overpayment may be "waived" by the Secretary if the overpayment was not the fault of the beneficiary and if repayment would cause hardship or violate the purposes of the Social Security Act. 42 U.S.C. 1383(b)(1).

preliminary injunction and for class certification. Ellender v. Schweiker, 550 F. Supp. 1348 (S.D.N.Y.1982). On November 17, 1983, the court granted plaintiffs' motion for partial summary judgment, and issued an order permanently enjoining the challenged debt collection practices. Ellender v. Schweiker, 575 F. Supp. 590 (S.D.N.Y. 1983), (Pet. 27a-63a). The Secretary did not appeal from these orders even though they were immediately appealable under 28 U.S.C. 1292(a)(1).

4. Plaintiffs subsequently moved for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), based on their claims that they had prevailed in the case and that the Secretary's position was not substantially justified. By decision dated April 10, 1984, the court granted, in part, plaintiffs' motion for fees.

Pursuant to the court's direction, the parties negotiated the amount of the fees payable under the decision, and entered into a stipulation as to that amount on July 18, 1984.

5. A stipulation and order dismissing the remaining claims of individual class members for damages was entered on December 19, 1984. At this point, there were no outstanding issues remaining to be decided by the court and the court's decision on the merits was in all respects final.

6. On January 3, 1985, the court entered a judgment which read as follows:

> Upon the annexed opinion and order of the Court entered April 12, 1984 and the annexed stipulation and order entered July 20, 1984 it is Adjudged that the plaintiffs'counsel do have and recover of the defendants the sum of $40,734.30. (Pet. 7a).

In forwarding this judgment to the clerk, the district court judge

instructed the clerk as follows: "This judgment closes this case. If for any reason this action cannot be closed, please advise Chambers immediately ...." (Pet. 7a). The memorandum containing this instruction was attached to the judgment and filed in the permanent court record. The judgment was duly docketed and the docket sheet indicates a copy of the judgment was mailed to the parties.[6] The Secretary was also put on notice of the entry of this judgment by a notation published in the New York Law Journal on January 8, 1985. (Pet. 7a).

7. On March 28, 1985, the Secretary moved under Rule 60(b) of the Federal Rules of Civil Procedure for an order vacating the January 3, 1985 judgment. The Secretary's moving papers stated that, due to law office failure,

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[6]. The Secretary claims he did not receive his copy.

he had failed to notice the notation in the Law Journal indicating that judgment had been entered. The Secretary also requested that the court enter a new judgment reflecting both the attorney's fee award and the terms of the permanent injunction that had been in effect since November, 1983. By decision dated July 19, 1985, the district court denied this motion.

8. On September 17, 1985, the Secretary filed a notice of appeal to the United States Court of Appeals for the Second Circuit from the permanent injunction order of November 17, 1983, the denial of defendants' Rule 60(b) motion and any judgment to be entered. This appeal was docketed as 85-6274.

9. On October 7, 1985, while the appeal in 85-6274 was pending, the district court issued a one page order refusing to enter a new judgment on the

merits. This order was issued in response to a letter from the Secretary requesting a new judgment.

10. The parties agreed to postpone briefing on the merits of the Secretary's appeal to the court of appeals to permit the court to determine first whether the appeal of the merits was timely. Plaintiffs then moved to dismiss as untimely the Secretary's appeal, except the appeal from the denial of the Secretary's 60(b) motion to vacate the judgment, which the parties agreed was timely. The Secretary argued (and plaintiffs did not dispute) that the appeal on the merits was not premature. The only issue was whether the appeal on the merits was too late.

11. The Secretary then petitioned the court for a writ of mandamus compelling the district court to issue a new final judgment. This petition was

docketed as 85-3066 and was referred to the same panel that was considering the motion to dismiss in 85-6274, the Secretary's appeal on the merits. The issue before the court in both the mandamus petition and the motion to dismiss the appeal on the merits was the same: whether a final judgment had been properly entered in January, 1985.

12. The day after the Secretary submitted his petition for a writ of mandamus, and the day that he submitted his brief in opposition to plaintiffs' motion to dismiss, the Secretary filed a separate notice of appeal from the district court's order of October 7, 1985 refusing to enter a new judgment. This appeal was docketed as 85-6332; it is the decision on this appeal from which the Secretary now seeks certiorari. When the Secretary submitted his brief in this second appeal to the court of appeals, he

explained his duplicative appeal[7] as follows:

> The question presented by the instant appeal is already before the panel of this Court (Judges Kearse, Pratt and Timbers) that is considering the motion of the plaintiffs to dismiss in part, as untimely, the Government's appeal on the merits in Ellender v. HHS, No 85-6274... That motion was argued on November 12, 1985 and is presently sub judice. The Government has also filed a petition for a writ of mandamus (Ellender v. HHS, No. 85-3066) seeking to compel Judge Cooper to direct the entry of a final judgment. It is the Government's understanding that the mandamus petition was referred to the panel considering the aforementioned motion to dismiss. The instant appeal is being pursued in addition to the petition for writ of mandamus because there is a split in the circuits as to the appropriate procedure for challenging an order of the type at issue here, and this

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[7]. Respondents filed a motion with the court of appeals, to which the Secretary consented, to consolidate the two appeals. The motion, however, was not considered until after the decision in the first appeal when it was denied as moot because the first appeal had already been decided.

> Court has not spoken on the subject. (Brief for Defendants-Appellants, No 85-6332, at 5 n.**)

13. On January 15, 1986, the court of appeals issued its opinion in 85-6274 dismissing the appeal on the merits as untimely because it was filed more than sixty days after the entry of final judgment. On the same day, it issued an order in 85-3066 denying the petition for writ of mandamus. This order stated: "It is ordered that said petition be and it hereby is DENIED. See opinion filed today in No. 85-6274."

14. Five days later, the Secretary submitted his reply brief in 85-6332, the appeal from the October 7, 1985 order refusing to enter a new judgment. The brief conceded that the issue on the appeal had been decided but suggested that the court of appeals could reconsider its ruling in 85-6274 because

"[t]he principle of law of the case is purely discretionary and does not deprive the Court of the power to consider issues previously ruled upon." (Reply Brief of Defendant-Appellants, No. 85-6332, at 2 n.* (Emphasis added)).

15. While the appeal in 85-6332 was pending, the Secretary petitioned for rehearing in 85-6274[8]. The petition stated that the issue for review was that decided in the January 15, 1986 opinion: whether the final judgment issued in January, 1985 commenced the time to appeal on the merits. The rehearing petition nowhere suggested that the court's disposition of the motion to dismiss was correct because the appeal was premature. In fact, the rehearing petition states that the issue of the district court's intent goes "to the

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[8]. The Secretary's petition fails to disclose the rehearing petition or its outcome.

existence of appellate jurisdiction, a fact not disputed by the Government." (Appellant's Petition For Rehearing, No. 85-6274, at 2). The petition for rehearing was denied on February 21, 1986.

16. The court of appeals' January, 1986 opinion dismissing the Secretary's appeal on the merits as untimely had specifically stated that it was expressing no view on the merits of the Secretary's timely appeal of the denial of the motion to set aside the judgment. (Pet. 13a). But while the petition for rehearing was pending, the Secretary abandoned his remedy under Rule 60(b) by stipulating to a dismissal with prejudice of the appeal from the district court's denial of the Rule 60(b) motion.

17. On April 28, 1986, the court of appeals dismissed the appeal in 85-6332 as moot. The panel observed that:

> The Secretary has recognized that the principal question presented here i.e.. whether final judgment had been entered in the district court prior to his motion for entry of such judgment, was already before this court in connection with plaintiffs' motion to dismiss in No. 85-6274. (Pet. 2a).

The court did not address this question on the merits. Instead it stated:

> In a decision filed on January 15, 1986, we granted plaintiffs' motion to dismiss in No. 85-6274, ruling that a final judgment had been entered in the district court no later than January 4, 1985. Ellender v. Schweiker, 781 F.2d 314 (2d Cir. 1986). Accordingly, the present appeal from the denial of the Secretary's March 1985 motion for entry of judgment became moot. (Pet. 2a-3a).

The court further observed that the Secretary had abandoned his challenge to the denial of his Rule 60(b) motion. It concluded:

> Whatever arguments the Secretary might have advanced in favor of the revival of his rights to have reviewed any

> decision of the district court made prior to entry of the January 1985 judgment could have been made in No. 85-6274. Those arguments may not be made here. (Pet. 3a).

The Secretary did not file a petition for rehearing in 85-6332.

18. The Secretary subsequently applied for and obtained an extension of time to file a petition for writ of certiorari in 85-6274, the court of appeals first decision dismissing the appeal on the merits. Under this extension, the Secretary's petition was due on June 21, 1986. No petition was filed.

19. The certiorari petition now before the Court was filed on July 25, 1986. The petition purports to seek review of the decision in 85-6332, (the decision dismissing the Secretary's second appeal as moot), but the only questions raised concern the correctness

of the court of appeals' January 15, 1986 determinations dismissing the appeal and denying the mandamus petition, from which no timely certiorari petitions were filed.

REASONS FOR DENYING THE WRIT

The Secretary has missed one time limitation after another: first, by attempting to collect overpayments from members of the plaintiff class long after the statute of limitations had expired; next--having been enjoined from pursuing illegal debt collection techniques--by failing to keep apprised of whether a judgment was entered after the case was concluded, although the judgment was mailed to him and entry of the judgment was published in the New York Law Journal; next, by failing to keep track of his own multiple efforts to obtain identical relief; and finally, by failing to observe the jurisdictional time limits for petitioning to this Court. He seeks by this late petition to revive a late appeal to the court of appeals to challenge an injunction, the terms of which have been settled for close to

three years.[9]

I. THE PETITION SHOULD BE DISMISSED AS UNTIMELY

The time limitation for petitioning for a writ of certiorari in a civil case is jurisdictional. Pursuant to 28 U.S.C. 2101, a petition must be filed within ninety days of the judgment or decree of the court of appeals, absent an extension granted by a Justice of the Supreme Court. Extensions may be granted for no more than sixty days. 28 U.S.C. 2101. This time limitation may be tolled only by a timely petition for rehearing filed in the Court of Appeals. See Supreme Court Rule 20. If a petition does not

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[9]. In light of the procedural complexities of this case, and the fact that critical facts are omitted from the Secretary's petition, this case is particularly inappropriate for summary disposition on the merits. See Stern, Gressman, Shapiro, Supreme Court Practice, (6th ed. 1986) 280-286.

meet these time limitations, this Court has no jurisdiction and the petition must be dismissed. See Department of Banking v. Pink, 317 U.S. 264, 266 (1942).

In this case, the court of appeals' decision ruling that a final judgment had been entered and dismissing the government's appeal on the merits was issued on January 15, 1986. A petition for rehearing was denied on February 21, 1986. The Secretary next sought, and was granted, an extension of time to petition for certiorari. Pursuant to this extension, the Secretary could file a petition for writ of certiorari up until June 21, 1986. Having failed to file a petition within this time period, the Secretary is barred by 28 U.S.C. 2101 from petitioning for review of the January 15, 1986 decision.

The Secretary nonetheless seeks review of the "reasoning" of the court of

appeals' decision of January 15, 1986, by styling his request for review as a petition from the court of appeals' subsequent order dismissing the appeal in 85-6332 as moot. The Secretary suggests that the decision in 85-6332 extends the time to petition from the decision in 85-6274 because "the Court of Appeals' decision in No. 85-6332 relies on the reasoning expressed in the opinion in No.85-6274...." (Pet. 11 n. 8). He further seeks to excuse his failure to petition from 85-6274 based on his newly adopted view that his own appeal on the merits in 85-6274 was premature, and that it was therefore correct for the circuit to dismiss the appeal even though the Secretary argued against dismissal in the circuit court. Rather than offering an excuse for his failure to petition from the denial of his mandamus petition, the Secretary does not mention the mandamus

petition in his petition for certiorari.

The Secretary's arguments for extending his time to petition are squarely contradicted by this Court's pronouncements on its jurisdictional limitations. This Court has long recognized that the time limitation for petitioning for a writ of certiorari in a civil case is not extended merely because the court of appeals issued a subsequent order in the same case. See Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213 (1952); Stern, Gressman & Shapiro, Supreme Court Practice (6th ed.1986) at 314-16. Even when the court of appeals has amended its judgment, the time to appeal is not extended unless the amendment is substantive. Id. at 211-12. See King v. Preterm, 448 U.S. 901 (1980); Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 378-80 (1965); Federal

Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952); Department of Banking v. Pink, 317 U.S. 264, 266-67 (1942). In Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., for example, this Court dismissed a petition as untimely even though the second order of the court of appeals was entitled "Final Decree" and explicitly affirmed portions of the lower court's order that had not been addressed by the initial decision of the court of appeals. This Court explained:

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and

> obligations which by its prior judgment, had been plainly and properly settled with finality.

344 U.S. at 211-12 (footnotes omitted).

In this case, the April 28, 1986 order of the court of appeals is plainly not substantive. The order does not purport to amend any of the findings of the first panel's opinion of January 15, 1986. In fact, it does not address the merits of the Secretary's arguments, finding instead that the Secretary's redundant appeal was moot because the issue had already been disposed of in 85-6274. Because the opinion in 85-6332 did not address the merits or change any matters of substance, it cannot operate to extend the time to petition for certorari. See Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. at 211-12.

Similarly, any power of the panel in 85-6332 to alter the ruling in 85-6274 is

irrelevant in determining the time to petition this Court. As this Court stated in Market Street Railroad Co. v. Railroad Commission of California, 324 U.S. 548, 551 (1945), the finality of a court of appeals decision "is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." Such finality may only be suspended by a timely petition for rehearing. Id at 552. In this case, the timely petition for rehearing in 85-6274 deferred the finality of the decision until February 21, 1986, when that petition was denied. Although the second panel might have taken the extraordinary step of reaching the merits and adopting a different result, this possibility in no way affected the finality of the result in 85-6274. See Market Street Railroad Co. v. Railroad Commission of California, 324 U.S. at

551.[10]

The Secretary disingenuously attempts to excuse his failure to petition from 85-6274, the court of appeals decision dismissing his appeal, by asserting that in his view, "the notice of appeal in No. 85-6274 was premature insofar as it sought to challenge the district court's ruling on the merits" and that, consequently, he does not "take issue with the disposition in that case." (Pet. 11 n. 8). This new-found view is a complete reversal of

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[10]. The Secretary's request to the second panel that it reach a different result on an issue decided by a prior panel is analogous to a request for rehearing en banc. It is well settled that such a request does not toll the time period for petitioning for writ of certiorari. See Stern, Gressman & Shapiro, Supreme Court Practice at 313. The time limitation is only tolled during the pendancy of a timely petition for rehearing. Here there was a petition for rehearing from the first panel's decision. The petition was denied on Feburary 21, 1986, and no timely certiorari petition was filed.

the Secretary's position in the circuit and ignores the reality that the circuit court dismissed the appeal not because it was too early but because it was too late.

By noticing an appeal on the merits in 85-6274, the Secretary affirmatively sought review, and obviously did not suggest that his appeal was premature. Plaintiffs in no way challenged the appeal as premature, but instead argued that the appeal was too late.[11] The parties fully litigated the issue whether the appeal on the merits was too late. The court specifically dismissed the appeal on the merits on the ground that it was too late. Furthermore, the Secretary's petition for rehearing

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[11]. It is well settled that when the appellee does not challenge an appeal as premature, the court of appeals need not dismiss the appeal on that ground. See Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978)(per curiam).

nowhere suggested the argument made here that the appeal should have been dismissed as premature. The Secretary's new "view" of the court of appeals' action is clearly no more than an attempt to cure his failure to submit a timely certiorari petition to review the court of appeals' decision.

Furthermore, even if the Secretary retrospectively agrees with the dismissal of his own appeal, he can hardly agree with the simultaneous denial of his petition for mandamus, seeking the identical relief the Secretary seeks here--an order requiring the district court to enter a new final judgment. The court of appeals denied this relief in denying the mandamus petition, based on the opinion in 85-6274 that final judgment had been entered no later than January 1985. To consider the certiorari petition "timely" under these circum-

stances would open the door to any litigant to extend indefinitely his time to petition for certiorari.

The Secretary would have this court dispense with all notions of finality to permit litigants to get repeated bites at the apple to appeal from a judgment after the time to appeal had lapsed: First, the litigant appeals and argues that there is no judgment. Second, he asks the appellate court for a writ of mandamus to require the district court to enter a new judgment. Finally, when both these attempts to revive his rights are rejected, the litigant need not seek review in this Court or pursue his remedies under Rule 60(b) to have the judgment vacated. Instead he can make a motion at any time to the district court requesting entry of a new judgment. When this is denied he can file a repetitive appeal to the court of appeals, and if

this appeal is rejected, he can cure his earlier failure to timely petition by simply filing a petition following the court of appeals' dismissal of the second appeal. Such a result completely abandons the principle of finality and leads to an enormous waste of judicial resources[12] since even appellate rulings on the finality of judgments could never be considered final.

Furthermore, by leaving the finality of judgments unsettled, the Secretary's approach means that litigants can never be assured that their rights have been settled. This is a particular hardship to the elderly and disabled members of the plaintiff class who live on subsistence incomes and who brought this case to challenge an overreaching attempt

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[12]. Here the Secretary had two appeals, one mandamus petition, and one petition for rehearing before the court of appeals, all raising the identical issue.

by the Secretary to collect alleged SSI overpayments, which in some cases occurred more than ten years ago.[13]

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[13]. By letter dated August 1, 1986, respondents put the Secretary's counsel on notice that the petition was untimely and requested that it be withdrawn so as to avoid the unnecessary expenditure of respondents' and the Court's time and resources to respond to the petition. No action was taken, however, to withdraw the petition. Because the petition is so patently untimely, and a response to the petition has caused an unnecessary diversion of legal resources from other needy elderly and disabled clients, respondents respectfully request that this Court consider the imposition of sanctions under Supreme Court Rule 49.2 and 50 or counsel's fees for unreasonably multiplying proceedings under 28 U.S.C. 1927.

THE COURT OF APPEALS CORRECTLY RULED THAT THE JUDGMENT ENTERED BY THE DISTRICT COURT MET THE REQUIREMENTS OF FED. R. CIV. P. 58 AND 79 (a) AND THAT THE SECRETARY COULD NOT NOW FILE AN APPEAL ON THE MERITS FROM THE PERMANENT INJUNCTION ENTERED IN NOVEMBER, 1983.

The Secretary, having failed to appeal in time from the district court judgment, now seeks this Court's help to establish rules that would wreak havoc with principles of finality of judgments. The Secretary argues that despite the fact that all issues in the case were finally adjudicated by the district court, and despite the fact that a judgment on a separate document was entered, and despite the district court's memorandum filed in the permanent court record stating that the "judgment closes the case," his time to appeal to the court of appeals has not begun to run because the judgment explicitly mentions only attorney's fees (awarded as a direct consequence of the plaintiff's having

prevailed in the case). The Secretary's position is that because the final judgment does not expressly mention the permanent injunction, granted by court order in 1983, he can appeal from the injunction years later simply by requiring the district court to issue a new judgment.

The petition for certiorari disguises itself as an effort to compel adherence to principles announced in United States v. Indrelunas, 411 U.S. 216, 218 (1973), holding that Rule 58 of the Federal Rules of Civil Procedure must be applied mechanically to require a judgment to be set forth on a separate document in order for the time to appeal to start to run. But the court of appeals did not question the holding of Indrelunas. As the circuit court ruled, there was strict compliance here with the requirements of Rules 58 and 79(a): the

January 4, 1985 judgment was set forth on a separate document and its contents were summarized in the clerk's docket, as the Federal Rules and Indrelunas require.

The Secretary quarrels with the court of appeals' statement that there is "no requirement in the Federal Rules of Civil Procedure that the document that constitutes the final judgment in a case be comprehensive." (Pet. 12a-13a). The Secretary argues that it is important for this court to grant certiorari to clarify what has to be in a judgment, so that litigants will know when their time to appeal starts to run. This argument obscures the reality here that the Secretary did not miss the time to appeal because of the contents of the judgment; he missed the time to appeal because he failed to notice that any judgment had been entered. As the court below noted:

We have little doubt that if

> the government attorneys had followed up on the notice published in the New York Law Journal on January 8, 1985, or had read the January 4 judgment and the court's memorandum that accompanied it, they could not have failed to recognize that the final judgment in the case had been entered. (Pet. 13-a).

Although it is undisputed that the Secretary missed the notation in the Law Journal[14], he argues that this case is important because even if he had learned of the district court's judgment he would not have realized that his time to appeal was beginning to run. This argument is belied by the Secretary's own conduct in this case. As the Secretary himself concedes, he promptly moved to have the judgment vacated and re-entered as soon as he became aware that it had been entered and that his time to appeal had

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[14]. The Secretary also claims he did not receive the copy of the judgment mailed by the clerk. Under Fed. R.Civ. P. 77 (d) a party's failure to receive notice of a judgment does not affect the time to appeal.

lapsed. (Pet. 6). Indeed, a party cannot safely ignore a document purporting to end the litigation when all issues have been decided in the hopes that it will not be deemed the judgment. Beaudry Motor Company. v. Abko Properties Inc., 780 F. 2d 751 (9th Cir. 1986), (appeal untimely; minute order denying post-trial motions was a final judgment from which a party's time to appeal runs.)[15] As the court of appeals also noted, nothing in the Federal Rules requires any particular form of judgment. F. R. Civ. Proc. 54(a) provides that:

> "Judgment" as used in these rules includes a decree and any

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[15]. In Beaudry, the court noted that "plaintiff's counsel received a document, the sole contents of which informed him that his post-judgment motions had been ordered denied and which was file stamped. We have no trouble concluding that in these circumstance a reasonable person would realize that the court had entered an order finally disposing of the case." 780 F.2d 751, 755 n.3.

> order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

As the court of appeals held, it is irrevelant that the final judgment referred only to the fee award:

> We see no reason...why an award of fees may not be made prior to or simultaneously with the entry of final judgment...When all issues as to the merits have been decided and a judgment is entered by which the court clearly intends to close the case, i.e. to enter a final judgment, the fact that the judgment disposes of the matter of fees does not make the judgment less final. (Pet. 11a).

Thus, even if the district court does not observe the technical rules for entering a final judgment in its order disposing of all of the issues on the merits, the fee judgment "sets the outer limit within which the notice of appeal must be filed." Exchange National Bank of Chicago v. Daniels, 763 F. 2d 286, 292 (7th Cir. 1986). Had a timely appeal

been filed from the January judgment, the Secretary could have raised all the issues in the case. See United States v. Clark, 445 U.S. 23, 25-26 n. 2 (1980). Although the January, 1986 final judgment does not refer to the merits, the only reason for granting attorneys' fees was that plaintiffs had prevailed on the merits. Under all the circumstances here, the court of appeals was correct in not permitting the various strategems proposed by the Secretary to permit a late appeal.

The cases the Secretary relies on are inapposite. Because U.S. v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958) was rendered before the 1963 amendment of the Federal Rules to require a judgment to be on separate document, much of its reasoning is now inapplicable. It should be noted, however, that the circumstances in that case--the failure to state the

amount of the judgment in the opinion or on the docket sheet, and the subsequent filing by the judge of a formal judgment--indicated that the district court did not intend that his opinion be the final judgment in the case. 356 U.S. at 235-6. Similarly, in C.I.T. Financial Service v. Yeomans, 710 F. 2d 416 (7th Cir. 1983), there was no opinion, transcript, order or any other document evidencing the court's disposition of the case. Here, in contrast, there was a judgment[16] on a separate document as well as a memorandum

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[16]. A judgment must be given a commonsense reading to include prior orders and reflect the court's disposition of the case. See Bandag Inc. v. Al Bolser Tire Stores, 719 F. 2d. 392 (Fed. Cir. 1983)(final judgment on a separate document effectively encompassed all prior orders even though these were not explicitly mentioned in the judgment. See also In re Forstner Chain Corporation, 177 F. 2d. 572, 578(1st Cir. 1949)(claim that judgment for costs was not final judgment on the merits was "overrefined technicality" at variance with intent of district judge who intended judgment to be his final disposition of the case).

from the district judge which was filed in the permanent court record stating "this judgment closes the case." There was no doubt about what happened or the terms of the injunction or the fee award. The Secretary's problem with the judgment is not its form, but that he missed it.

Finally, it should be noted that the Federal Rules provide ample remedies short of Supreme Court certiorari petitions for a litigant aggrieved by perceived deficiencies in judgments or confused by the circumstances of the entry of the judgment. These safeguards may explain why the issue raised by the Secretary is not one which has frequently engaged the lower courts.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure permits the district court to extend a party's time to fil a notice of appeal "upon a showing of excusable neglect or good cause...upon a

motion filed not later than 30 days after expiration of the time prescribed by this Rule 4(a)." Here, although the Secretary learned of the final judgment in time to move under Rule 4 (a)(5), he failed to do so.

To the extent that a party is aggrieved by the form or contents of the judgment. Rule 60(a) of the Federal Rules of Civil Procedure provides that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party..."[17] Rule 60(b)

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[17]. The alleged "error" here is the failure specifically to include the permanent injunction order in the judgment. Here, the order granting the injunction was clear and explicit as to the terms of the injunction and adding its terms to the judgment in no way would change the substantive relief awarded. Indeed, the Secretary has been complying with the injunction for over four years. Thus this correction would be of the

permits the court to relieve a party from a final judgment for a variety of specified reasons (for example, mistake, misconduct by the adverse party) or for "any other reason justifying relief from the operation of the judgment" Rule 60(b) is occasionally used to permit re-entry of a judgment to permit a timely appeal. See, e.g., Rogers v. Watt, 722 F.2d 456 (9th Cir. 1983). Here the Secretary in fact moved to vacate the January, 1985 judgment and for entry of a new judgment, but when that motion was denied, he inexplicably abandoned his timely appeal of the denial of that motion. He abandoned this appeal despite the clear statement by the court of appeals that their dismissal of his appeal on the merits as untimely did not affect his concededly timely appeal of the denial of the Rule 60(b) motion, that the issue of

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type covered by Rule 60(a).

whether the Secretary's failure to become aware of entry of judgment entitled him to relief from the judgment would be dealt with in that appeal and that the court expressed no view as to the merits of the Rule 60(b) appeal. (Pet. 13a).

The Secretary's failure to pursue the Rule 60(b) appeal was noted by the second panel of the court of appeals in dismissing as moot the Secretary's appeal from the district court's denial of the Secretary's motion to enter a final judgment:

> Whatever arguments the Secretary might have advanced in favor of the revival of his rights to have reviewed any decision of the district court made prior to entry of the January 1985 judgment could have been made in No. 85-6274 [the docket number of the abandoned appeal from the denial of the Rule 60(b) motion]. Those arguments may not be made here. (Pet. 13a).

The lesson here is not that further clarification of these issues is needed;

it is that the Secretary has to pay attention to his cases. If after a permanent injunction is entered, the Secretary elects not to appeal for several years[18] but to wait for a judgment, the Secretary should not miss the judgment when it is finally entered.

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[18]. The Secretary's assertions regarding the importance of this case are belied by his torpor in pursuing his appeal of the merits and his cavalier abandonment of remedies under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

DOROTHY ELLENDER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents' primary contention (Br. in Opp. 23-35) is that our petition seeking review of the court of appeals' final judgment in Docket No. 85-6332 (2d Cir. Apr. 28, 1986), is precluded by our failure to petition for review in Docket No. 85-6274 (2d Cir. Jan. 15, 1986). Respondents' contention is altogether meritless.

It is of course entirely clear that the government is not required, on pain of losing its right to seek review in this Court of any given issue, to petition for certiorari from the first appellate court determination of that issue. See, *e.g.*, *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984); cf. *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980) ("[I]t is irrelevant that the [court below] reached [its] holding by relying on its earlier decision * * *. An appeal under [28 U.S.C.] 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional * * * not just for the first such decision."). In the instant case, we are seeking review of the court of appeals' holding in Docket No. 85-6332, that is, its disposition of our appeal

from the district court's denial of our motion for entry of final judgment on the merits. Respondents' contention in essence is that it was legally impossible for us to seek certiorari from the court of appeals' judgment in No. 85-6332 because (1) the panel in No. 85-6332 relied on the reasoning and holding of the panel in No. 85-6274, and (2) we declined to seek certiorari from the court of appeals' judgment in No. 85-6274. There is no support in law or logic for this contention.

Respondents rely (Br. in Opp. 26) on the principle that the time to petition for certiorari "is not extended merely because the court of appeals issue[s] a subsequent order in the same case" that does not substantially change its original judgment. But that principle is plainly inapplicable here. The court of appeals' order dismissing the appeal in No. 85-6332 was not, in either form or substance, a "subsequent order" in No. 85-6274 or an amendment of the judgment in that earlier case. The two cases were distinct appeals, seeking review of distinct actions of the district court; the cases were separately briefed and were heard and decided by different panels of the Second Circuit. Our petition for certiorari seeks review of the court's judgment in No. 85-6332. Since in deciding No. 85-6332 the court of appeals relied on its analysis in No. 85-6274, our petition discusses that analysis. The fact remains, however, that the court of appeals considered and decided two separate appeals, and the government's decision not to seek review in this Court of the judgment on the first appeal in no way forecloses our petition for a writ of certiorari from the judgment on the second appeal. See *United States* v. *Clark, supra.*

In any event, as we have explained previously (Pet. 11 n.8), the question presented in our petition—whether the court of appeals erred in failing to direct the district court to enter a final judgment on the merits—could not properly have been raised in a petition seeking review of the judg-

ment in No. 85-6274. Our position throughout this litigation has been that the district court is required to enter a final judgment on the merits that complies with the Federal Rules of Civil Procedure. We accordingly informed the court of appeals in No. 85-6274 that our notice of appeal on the merits in that case had been filed, as a protective matter, "in anticipation of the entry of a final judgment on the substantive claims in this litigation" (Memo of Law in Opp. to Plaintiffs-Appellees' Mot. to Dis. 20). Because we believe that our appeal on the merits in No. 85-6274 was premature, we do not take issue with the court of appeals' *judgment* dismissing that appeal, but only with its rationale. The judgment with which we do disagree is the court of appeals' judgment in No. 85-6332, whereby it refused to order the district court to enter a final judgment on the merits, and it is from the court of appeals' judgment in No. 85-6332 that we have properly and timely sought certiorari.

Respondents' alternative suggestion (Br. in Opp. 32) that we should have sought certiorari from the court of appeals' denial of our mandamus petition is equally untenable. Such a petition for certiorari could properly have presented only the question where the court of appeals abused its discretion in denying our request for mandamus—not whether a final judgment had been entered. Given the stringent standards governing mandamus (see, *e.g., Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will* v. *United States*, 389 U.S. 90, 95 (1967)), the abuse-of-discretion issue obviously is distinct from the question whether the court of appeals erred in concluding that the judgment on the collateral matter of attorney fees constituted the final judgment on the merits of the case. Indeed, courts often rule for a party on appeal after denying a request for mandamus. Given the pendency of our appeal in No. 85-6332 at the time the mandamus petition

was denied, it was proper for us to follow the regular course by allowing the court of appeals to decide that appeal prior to seeking certiorari.

2. Respondents offer virtually no response to our explanation of why the decision below merits review by this Court. Respondents do not mention Fed. R. Civ. P. 79(a), which requires that the docket sheet show the substance of a judgment; instead, they think it sufficient that the district judge sent the court clerk an internal and nonpublic memorandum expressing his determination that "this judgment closes this case" (Pet. App. 7a; see Br. in Opp. 44). Respondents do not discuss our contention that the court of appeals improperly relied on the district court's intent, a reliance that conflicts with the purpose of Fed. R. Civ. P. 58 and the decisions in other circuits (see Pet. 14-17). And respondents do not mention the Rules' policy of encouraging clarity in judgments and of preventing parties from facing the alternatives of losing their appeal rights or filing blizzards of protective appeals.

Instead, respondents fault the Secretary for "failing to keep track of his own multiple efforts to obtain identical relief" (Br. in Opp. 22), and suggest (*id.* at 33) that we are seeking "repeated bites at the apple to appeal."[1] We of course agree that we have made "multiple efforts to obtain

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[1] Respondents' related assertion is that a party under our analysis would be able to move in the district court for a "new" judgment at any time, and then take a timely appeal from the denial of that motion, thus rendering "the finality of judgments unsettled" (Br. in Opp. 33-34). But we make no such claim. What we sought here is not a *new* judgment on the merits, but the entry of an *initial* final judgment. The district court itself recognized that no such final judgment had ever been entered; it simply concluded that one was unnecessary (Pet. App. 19a n.1).

identical relief," efforts that we properly undertook to protect the interests of the United States. And we agree that the consequence of our protective efforts is a record that is procedurally quite complex. What the complexity of the record demonstrates, however, is the procedural morass likely to result when a district court fails to issue a document that is unambiguously a "final judgment" on the merits of the case.[2] The steps necessary to comply with the requirements of Rules 58 and 79(a) are remarkably simple. The district court was unjustified in refusing to take those steps, and the court of appeals erred in sanctioning its refusal.[3]

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[2] As we noted in our petition (at 20), neither the district court nor respondents were able to identify with certainty a single document that constituted the "final judgment" on the merits. Respondents argued below that *either* the December 1984 order disposing of their damages claims *or* the January 1985 order respecting the attorney fees represented the final judgment, and the court of appeals opted for the latter (Pet. App. 8a). But the district court itself did not regard its attorney-fee judgment as the final judgment on the merits; six months after entering the attorney-fee judgment, the district court "note[d] that a formal judgment was never entered after [the] November 17, 1983 opinion permanently enjoining defendants' challenged practices" (*id.* at 19a & n.1). The district court simply concluded that a "formal judgment" on the merits, incorporated in a separate document, was unnecessary. See *id.* at 14a, 19a n.1.

[3] Respondents also assert (Br. in Opp. 38-42) that we were deprived of our right to appeal not because of any defect in the substance of the judgment entered on January 4, 1985, but rather because of our failure to realize that any judgment had been filed on that date. They speculate that had we known of the judgment respecting the attorney fees we would have recognized that it was final on the merits. We note first that respondents—who submitted the proposed judgment order without notifying government counsel, and who waited until 4 days after our appeal time had expired to request payment of the attorney fees (Pet. 5-6)—are not very well situated to fault the government for its ignorance of the order. In any event, the facts belie respondents' speculation: our Rule 60(b) motion, relying on Fed. R. Civ. P. 54(b), shows that when we did learn of the January 1985 order, we interpreted

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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it as simply determining the attorney-fee issue, and sought reconsideration only on that basis (see Pet. 6-7, 19-20; Pet. App. 18a-19a). And since our Rule 60(b) motion concerned only the attorney-fee portion of the case, we do not understand why respondents charge us with inconsistency (Br. in Opp. 45-47) in abandoning our appeal on that issue.

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